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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE GOODYEAR TIRE & RUBBER COMPANY,

Petitioner,

v.

DALE L. HODDER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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QUESTIONS PRESENTED

1. Whether imposition of a financial penalty in the form of punitive damages for failure to conform to a legal standard not promulgated until after the time of the conduct for which the penalty is imposed violates the Due Process Clause of the Fourteenth Amendment.

2. Whether subjecting a defendant in a civil action to unlimited monetary punishment violates the Due Process Clause of the Fourteenth Amendment.

3. Whether the Excessive Fines Clause of the Eighth Amendment applies to the award of punitive damages in civil actions and, if so, whether the $4,000,000 punitive damage award in this case violates that Clause.*

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* In addition to the parties named in the caption to this petition, Pioneer Rim & Wheel Company, Remer Oil Company, Inc., Acheson Tire Company, Arrowhead Equipment Company, Itasca Tire Company, and Motor Wheel Corporation, a wholly owned subsidiary of The Goodyear Tire & Rubber Company ("Goodyear"), were also defendants at the trial in this case. Goodyear and Motor Wheel were the only defendants that prosecuted an appeal to the Supreme Court of Minnesota. Respondent Hodder pursued a cross-appeal in that court that raised no federal questions. Motor Wheel is not a party to this Petition because punitive damages were assessed only against Goodyear.

Goodyear has no parent company and has the following subsidiaries or affiliates that are not wholly owned: Brad Ragan, Inc.; South Pacific Tyres, N.Z., Ltd.; Nitriflex, S.A. Industria e Comercio; and Goodyear Canada, Inc.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

The May 6, 1988 decision of the Supreme Court of Minnesota in this case imposed a $4,000,000 punitive damage assessment on Goodyear for failure to conform to a standard of conduct that had never been recognized by that court. That court made a purely subjective, *ad hoc* determination of the magnitude of this penalty without any meaningful statutory or other constraint on the outside limit of such awards. These actions manifestly deprived Goodyear of its right to due process under the Fourteenth Amendment and its right to be free from excessive fines under the Eighth Amendment. They raise issues of wide-

spread significance in nearly every jurisdiction in the Nation.

OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of Minnesota affirming the judgment of the trial court with respect to liability and compensatory damages and imposing a punitive damage award of $4,000,000 is reproduced in App. A, 1a-30a, and is reported at 426 N.W.2d 826 (Minn. 1988). The order of that court denying Goodyear's Petition for Rehearing is unreported and is reproduced in App. B, 31a-33a. The order of that court staying execution of the punitive damage portion of the judgment is unreported and is reproduced in App. C, 34a-35a.

JURISDICTION

The decision of the Supreme Court of Minnesota was announced on May 6, 1988. Goodyear's Petition for Rehearing was denied on July 25, 1988. As discussed more fully below, each of the federal constitutional questions presented in this petition was properly raised in the Minnesota courts and each is therefore within this Court's jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Excessive Fines Clause of the Eighth Amendment provides:

> [N]or [shall] excessive fines [be] imposed . . . .

2. The Due Process Clause of the Fourteenth Amendment provides:

> [N]or shall any State deprive any person of . . . property, without due process of law . . . .

STATEMENT OF THE CASE

A. Statement of Facts

This case challenges a $4,000,000 penalty imposed to punish Goodyear for its inadequate distribution of warnings about the risks incident to use of its tire rims. Respondent was injured when a 25-year old worn and corroded rim explosively separated while he was mounting a tire on a truck. The jury found Goodyear, the manufacturer, liable and awarded compensatory and punitive damages. The Supreme Court of Minnesota affirmed the compensatory damage verdict, but set aside the jury's punitive damage decision and entered its own punitive damage judgment based on a new theory. Goodyear was punished by that court for failure to warn of the risks of misuse of a product that (1) was sold decades earlier, (2) was neither defectively designed nor manufactured, and (3) had outlived its useful life.

The tire rim involved in this case was a two-piece K-rim assembly, more specifically, a KWX rim, manufactured by Goodyear. (The term "K rim" includes both KWX rims and KW rims. The two rims are identical in design but the KW rim is slightly heavier.) Goodyear sold this particular KWX rim assembly in 1955. App. A, 4a, 426 N.W.2d, at 829. Production of the KWX rim was discontinued in 1962. *Id.*

According to the court below, hundreds of thousands of KWX-type rims were manufactured and sold by Goodyear, and millions of tire changes occurred without incident using these rims. *Id.*, at 12a, 426 N.W.2d, at 833. The only evidence introduced at trial on this point showed that Goodyear manufactured approximately 10 million K rims and that there have been 150-200 million tire changes on K rims. Trial Transcript 6,335-36, D. Ex. 709.

The KWX rim was neither defectively designed nor defectively manufactured. *Id.*, at 20a-21a, 426 N.W.2d, at

837. Indeed, the jury expressly found that the KWX rim did not present an unreasonable risk of harm. *Id.*, at 19a, 426 N.W.2d, at 836.

It eventually became evident that KWX rims could explosively separate if not handled properly. App. A, 12a, 426 N.W.2d, at 833. Due to "improper servicing or misuse," approximately 134 K-rim explosions occurred over the years. *Id.* As a consequence, by the late 1970's Goodyear undertook an extensive program to distribute safety films, posters, manuals, advertising, and mass mailings, *id.*, at 13a, 17a, 426 N.W.2d, at 833, 835, telling of the "dangers and safety measures to be taken," *id.*, at 17a, 426 N.W.2d, at 835, relative to these rims and the "dangers associated with misassembly or use of worn parts." *Id.*, at 4a, 426 N.W.2d, at 829.

Respondent Hodder was injured in 1981 when the "corroded and worn" KWX rim he was mounting on a truck at a gas station in Remer, Minnesota explosively separated. *Id.* In response to special interrogatories, the jury found that the "useful life" of this particular KWX rim had expired prior to Hodder's accident but that Hodder was not negligent in failing to discover this fact. Special Verdict, interrogatories 15-16, App. D, 38a.

Hodder's action to recover damages for his injuries was tried to a jury in 1986. He contended that the KWX rim that had caused his injuries was defectively designed and was not accompanied by adequate warnings, and that a $12,500,000 punitive damage award should be imposed against Goodyear, computed on the basis of recalling 250,000 rims at the cost of $50 each. App. A, 19a-20a, 426 N.W.2d, at 836. The jury was instructed that

> Goodyear and Motor Wheel have the duty to give reasonable warning as to dangers inherent or reasonably foreseeable in using the KWX truck rim. If Goodyear/Motor Wheel knew or reasonably could have discovered the danger involved

> in the use of the KWX truck rim, and if the KWX truck rim was not accompanied by adequate warnings and instructions, then Goodyear/Motor Wheel is negligent.
>
> Goodyear/Motor Wheel is obligated to keep informed of scientific knowledge and discoveries in its field. Goodyear/Motor Wheel must provide adequate warnings of dangers inherent in improper use of the KWX truck rim, if the use is one that Goodyear/Motor Wheel should reasonably foresee.
>
> For a warning to be adequate, it must be set out in such a way that heeding the warning will make the product reasonably safe for use. The warning must be in a form which could reasonably be expected to catch the attention of, and be understood by, the ordinary user.

Trial Transcript 14,043-45.

It was understood by the litigants and the trial court that this jury instruction dealt with point-of-sale warnings. Indeed, Goodyear successfully objected to Hodder's argument to the jury that liability could be imposed pursuant to a "continuing failure to warn." Trial Transcript 13,956, App. E, 39a. Thus, no jury instruction was given and no argument was made to the jury about "what the law might be," App. A, 12a, 426 N.W.2d, at 833, regarding a continuing post-sale duty to warn.[1]

While the jury determined that the rim was not defectively designed, Special Verdict, interrogatory 1, App. D, 36a, it decided that the rim "was not accompanied by adequate warnings." Special Verdict, interrogatory 3, App. D, 37a. It awarded $3,368,916 in compensatory damages and $12,500,000 in punitive damages.

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[1] Respondent Hodder specifically stated that "we are not talking about a continuing duty to warn," Transcript 13,681, App. F, 42a. Moreover,

On direct accelerated review, the Supreme Court of Minnesota affirmed liability and the compensatory damage verdict. However, the court determined that the jury's punitive damage award was predicated on a theory of failure to recall a defective product, a cause of action neither claimed by Hodder nor submitted to the jury by the trial court. App. A, 19a-20a, 426 N.W.2d, at 836. Such a theory was not only incompatible with the jury's finding that the KWX rim did not "present an unreasonable risk of harm by reason of design," *id.*, at 19a, 426 N.W.2d, at 836, but also would have raised questions of preemption under the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381, *et seq.* (1982). The court concluded that it was "inescapable that the jury awarded appreciable punitive damages on a theory the jury itself had rejected." App. A, 20a, 426 N.W.2d, at 836. Thus, the court held that the "award of punitive damages cannot stand because of obvious error in the jury's calculations." *Id.*, at 20a, 426 N.W.2d, at 837.

The court went on to consider whether Goodyear could be held liable for punitive damages on another theory, *i.e.*, failure to comply with a continuing post-sale duty to warn. The court acknowledged that it had not "had occasion to deal with this question before." *Id.*, at 11a, 426 N.W.2d, at 833. Nevertheless, although the KWX rim was not defective and Goodyear had no duty to recall the rims or warn persons not to use them, the court held that Goodyear had a continuing post-sale duty in 1981 to warn of

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the Supreme Court of Minnesota expressly found that the jury instructions given did not "declare what the law might be on [the] subject" of post-sale duty to warn. App. A, 12a, 426 N.W.2d, at 833. Having recognized that the KWX rim was not defectively designed or manufactured, App. A, 20a-21a, 426 N.W.2d, at 837, and that Goodyear became aware of the danger posed by misuse of these rims "after 1955," App. A, 11a, 426 N.W.2d, at 832, the Supreme Court of Minnesota did not purport to find that Goodyear breached the duty, well established in Minnesota law, to warn of known dangers inherent in a product via point-of-sale labels and instruction manuals.

the risks associated with using them. *Id.*, at 12a, 426 N.W.2d, at 833. And, although Goodyear had disseminated warnings that were adequate in content and illustrated the risks of misuse with "devastating vividness," *id.*, at 17a, 426 N.W.2d, at 835, the "problem was that these materials received inadequate distribution." *Id.* Thus, "the manufacturer's fault here consisted of negligent failure to warn." *Id.*, at 16a, 426 N.W.2d, at 835. Breach in 1981 of this duty newly created in 1988 was held to constitute willful indifference to the safety of others and, therefore, to warrant the imposition of punitive damages.

Having thus sustained Goodyear's liability for *some* punitive damages, the Supreme Court of Minnesota purported to reduce the jury's award. However, since the court was operating under a theory not considered by the jury, in reality it assessed *de novo* "an appropriate punitive damages award [of] $4 million" for Goodyear's failure to comply with the newly announced continuing duty to warn. App. A, 21a, 426 N.W.2d, at 837. The case was remanded for the imposition of punitive damages in that amount.

Goodyear filed a timely Petition for Rehearing in the court below, which was denied without opinion on July 25, 1988. App. B, 32a. Goodyear paid the compensatory damages and filed a motion to stay execution or enforcement of the punitive damage portion of the judgment. That motion was granted by the court below on August 10, 1988, App. C, 34a, in an order that stayed execution of the punitive damages portion of the judgment until October 24, 1988.

B. Presentation of the Federal Questions

Because the Minnesota courts rejected without discussion the federal questions presented herein, Goodyear acknowledges its burden to demonstrate that these questions were properly presented to those courts and that they are therefore within this Court's jurisdiction under 28 U.S.C. § 1257(3).

1. Presentation of the Federal Due Process Challenge to the Imposition of Punitive Damages Based on a Newly Created Legal Duty

The Supreme Court of Minnesota held Goodyear liable based on a novel, retroactively applied legal standard and assessed a punitive fine of $4,000,000 for its failure to have comported with that new standard. Goodyear responded by contending in its Petition for Rehearing that its federal due process rights were violated because it was held liable based on a theory not submitted at trial, Petition for Rehearing, App. G, 44a-46a, and because the "Court's imposition of $4 million in punitive damages on a newly-recognized, unsubmitted standard of liability retroactively applied against Goodyear is abhorrent to any notion of fundamental fairness and due process of law." *Id.*, at 48a-49a & n.4, *citing, inter alia*, the Fourteenth Amendment, the Ex Post Facto Clause, and *Bouie* v. *City of Columbia*, 378 U.S. 347, 354 (1964). This federal due process challenge (and Goodyear's concurrent invocation of the counterpart provision of Minnesota's Constitution) was expressly predicated upon the adoption of a standard of conduct that the Supreme Court of Minnesota acknowledged it had not "had occasion to deal with . . . before." App. A, 11a, 426 N.W.2d, at 833.

Goodyear cannot have been expected to anticipate that the court below would, on the one hand, agree with it that the jury's award of punitive damages was unlawful and, on the other, assess a completely new punitive damage award for violating a substantive standard that previously had not been the law in Minnesota. It could not have asserted its due process objection to this development prior to that court's decision. Therefore, because this defense was raised at the first possible opportunity, the federal question was timely and properly raised. As this Court explained in *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 86 n.9 (1979), "federal claims . . . have been adequately presented even though not raised in lower state

courts when the highest state court renders an unexpected interpretation of state law . . . ." *See also, e.g., Brinkeroff-Faris Trust Co.* v. *Hill*, 281 U.S. 673, 677-78 (1930) (federal claim first raised on petition for rehearing in state supreme court was timely "since it was raised at the first opportunity"); *Saunders* v. *Shaw*, 244 U.S. 317, 320 (1917) (violation of Fourteenth Amendment for state supreme court to reverse trial court in such a way as to deny litigant an opportunity to present evidence; "it would leave a serious gap in the remedy for infraction of [federal] constitutional rights if the party aggrieved in such a way could not come here.").

2. Presentation of the Federal Due Process Challenge to the Imposition of Unlimited Monetary Punishment

As noted earlier, the jury in this case assessed $12,500,000 in punitive damages based upon "a theory the jury itself had rejected." App. A, 20a, 426 N.W.2d, at 836. In order to remedy this legal defect in the jury's verdict, the court below could (and should) have reversed the jury's determination and eliminated any award of punitive damages.[2] Alternatively, it might have granted a new trial to Goodyear in which the issues of Goodyear's liability for punitive damages and the magnitude of any punitive damage award would have been retried. Instead, the Supreme Court of Minnesota usurped for itself the jury's retrial function: the court made its own *de novo* assessment of the "egregiousness" of Goodyear's conduct and determined itself the appropriate punitive fine in light of the purpose of such a fine. That purpose, according to the court, is "to punish the defendant, not compensate the plaintiff who has already been compensated." *Id.*, at 20a, 426 N.W.2d, at 837.

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[2] As discussed below, because the Supreme Court of Minnesota announced a new standard of conduct in this case, it could not, consistently with due process, impose punitive damages retrospectively based upon that newly created duty.

Thus, although the court below characterized its function as involving the "reduction" of the jury's $12,500,000 punitive award, there is no doubt that the court was displacing the role of a jury in a retrial and determining on its own the amount of punishment necessary to fulfill the punitive purpose of that award. The court explained its actions in a single paragraph of its opinion that, on its face, demonstrates beyond any doubt that the Supreme Court of Minnesota alone was determining the size of the $4,000,000 award at issue in this case:

> In determining the reduction, we look for proportionality between the egregious misconduct and the amount of damages, keeping in mind "those factors which *justly bear* upon the *purpose* of punitive damages." Minn. Stat. § 549.20, subd. 3 (1986) (emphasis added). Here, first of all, the award must be substantially discounted for the erroneous per-rim recall calculation. Secondly, while the focus is on the dangerous propensity of the K-rim to explode, the egregious misconduct must, under the jury's findings, be restricted to the inadequacies of the warnings; the product itself, it must be remembered, was found not defective, neither in design nor manufacture, nor was there a complete failure to warn. It appears that the jury, in punishing the defendant, may have included factors not "justly bearing" on punitive damages. Finally, the purpose of punitive damages needs to be kept in mind, namely, to punish and deter the conduct found to be willfully indifferent to the safety of others. *We conclude, in this case, that an appropriate punitive damages award should be $4 million.* The award, therefore, is reduced from $12.5 million to $4 million.

Id., at 20a-21a, 426 N.W.2d, at 837 (emphasis added).

In this case, Goodyear attacks the $4,000,000 punitive damage award assessed *de novo* by the Supreme Court of Minnesota on the basis of its unexplained pronouncement that $4,000,000 was "an appropriate punitive damage award." As illustrated by the foregoing excerpt from the court's opinion, the court below operated in the total absence of any statutory limit or meaningful restraint on the maximum potential punishment that could be assessed against Goodyear. Although the court imposed a punitive fine of $4,000,000, "[i]t could, as well, have been almost any amount." *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 276 n.3 (1984) (Powell, J., dissenting).

At its first opportunity to do so—on rehearing—Goodyear expressly argued that the " 'wholly standardless discretion [of the Supreme Court of Minnesota] to determine the severity of punishment appears inconsistent with due process.' " App. G, 47a-48a, *quoting Bankers Life and Casualty Co.* v. *Crenshaw*, 108 S. Ct. 1645, 1656 (1988) (O'Connor, J., concurring in part and concurring in the judgment). Thus, based upon the authorities discussed in part B.1. above, Goodyear properly presented this federal question to the Minnesota courts.[3]

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[3] Although the punitive damage award at issue in this Court is the $4,000,000 award ultimately determined to be appropriate by the Supreme Court of Minnesota, Goodyear had previously argued in a post-trial motion that the trial court's vague punitive damage instruction "violated Goodyear's right of due process of law guaranteed by the United States . . . constitution[]" because, *inter alia*, the jury was given "free rein to punish Goodyear for alleged willful and wanton conduct . . . ." Brief in Support of Motion to Amend the Court's Findings, Etc., App. H, 62a. On direct appeal, Goodyear argued with respect to the $12,500,000 punitive award that

> [i]mposition of punitive damages in the absence of sufficient standards also implicates due process concerns "which in an appropriate setting must be resolved." Fundamental fairness allows punishment only for conduct contrary to well-defined standards . . . . Due process requires that Goodyear have notice that certain conduct is proscribed before it can be punished for that conduct. Section

3. Presentation of the Excessive Fines Clause Challenge to the $4,000,000 Punitive Award

As discussed in part B.2. above, the punitive damage award challenged by Goodyear in this Court is the $4,000,000 award assessed *de novo* by the Supreme Court of Minnesota in disposing of Goodyear's appeal, not the $12,500,000 jury-imposed punitive damage award which was set aside and superseded by a new penalty for a separate and newly created offense. Because the Supreme Court of Minnesota imposed in the first instance a separate, unconstitutionally excessive fine, Goodyear—in reliance on this Court's decisions in *Bankers Life* and *Aetna*—argued on rehearing that this punishment violated its rights under the Excessive Fines Clause of the Eighth Amendment (and its counterpart in the Minnesota Constitution). *See* App. G, 58a-60a. Thus, Goodyear raised its Excessive Fines Clause challenge to the $4,000,000 punitive fine imposed by the court below at the first available opportunity. This challenge was thus adequately presented to the Minnesota courts. *See, e.g., Pruneyard Shopping Center* v. *Robins*, 447 U.S., at 86 n.9.

REASONS FOR GRANTING THE WRIT

This case is but another example of cases recently coming to this Court or presently on the Court's docket in which indisputably substantial constitutional challenges to large punitive damage awards have been presented. Among

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549.20 should not be used to extend punitive damages to newly recognized causes of action . . . . Punitive damages . . . violated Goodyear's due process rights. They must be stricken.

Appellants' Brief, App. I, 65a, *quoting Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813, 828-29 (1986) (other citations omitted). Thus, Goodyear consistently raised federal due process objections to the imposition of unlimited punitive damage awards from the time the jury returned its $12,500,000 verdict through the rehearing stage in the court below.

these cases, this case presents the most egregious example of the imposition of severe punishment based upon retroactive application of a newly created, substantive rule of conduct. This Court's warnings regarding the "important" constitutional implications of the infliction of punitive damages, first sounded on April 22, 1986 in *Aetna* and reiterated in *Bankers Life*, have gone and continue to go unheeded by state courts and legislatures. Only this Court can impose constitutional order on a governmentally sponsored system of punishment in which new rights to recover punitive damages are constantly being created by state courts, a system afforded only the most minimal supervision by legislatures that seem unwilling to correct the severe, arbitrary, and capricious results it produces.

A. Whether Retroactive Imposition of Punitive Damages for Failure To Satisfy a Newly Created Legal Standard Violates the Due Process Clause Presents an Important, Recurring Question That This Court Should Resolve

In exercising their wide-ranging common law authority to administer remedies for civil wrongs, state courts have the power to recognize new torts and expand the standards pursuant to which existing torts provide a right to recover damages to compensate injuries. It has long been accepted that state courts may apply new standards to conduct occurring years before and require compensation for injuries caused even if it is necessary to expand upon the permissible standards of conduct that existed at the time the tort was committed. Such a process is not necessarily unreasonable in the context of the compensatory function of tort law. Punitive damages, however, raise entirely different considerations.

In some cases, including this one, punishment in the form of punitive damages has been imposed for conduct that was not clearly labeled wrong by the courts at the time it occurred. The Constitution, however, disfavors ret-

roactive lawmaking, whether by legislatures or by courts. The constitutional hostility towards retroactive lawmaking increases as the punitive character of the law increases. For example, the Bill of Attainder and Ex Post Facto Clauses, Art. I, §§ 9, 10, create a nearly absolute ban on retroactive penal legislation, and the Due Process Clauses of the Fifth and Fourteenth Amendments prohibit retrospective judicial enlargement of obligations imposed by the criminal law. *See, e.g., Bouie* v. *City of Columbia*, 378 U.S. 347 (1964). Although laws and judicial acts lacking punitive character are subject to less demanding review, *see, e.g., Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1975), even non-punitive retroactive lawmaking is constitutionally disfavored. *See, e.g., United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977) (repeal of statutory assurance to bondholders violated the Contract Clause).

While punitive damages are not imposed after a criminal trial, they are clearly a form of punishment and "serve the same function as criminal penalties." *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting). The jury here was instructed that it could, "in addition to the other damages to which you find the plaintiff entitled, award the plaintiff an amount which will serve to punish and deter Goodyear. . . ." App. J, 67a. The opinion of the court below unequivocally characterizes the punitive damage award it imposed on Goodyear as a form of punishment: "Punitive damages are to punish the defendant, not compensate the plaintiff who has already been compensated." App. A, 20a, 426 N.W.2d, at 837. *Accord, International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 48 (1979) (punitive damages are "private fines levied by civil juries to punish reprehensible conduct"); *Smith* v. *Wade*, 461 U.S. 30, 68 (1978) (Rehnquist, J., dissenting) (purpose of punitive damages is to visit a punishment on defendant).

The Due Process Clause requires at a minimum that Goodyear be given clear and prior notice of the standard

of conduct it had to satisfy before it could be punished for conduct otherwise fully legal at the time. Goodyear had no notice in 1981 that it could be punished for inadequate distribution of post-sale warnings concerning a non-defective product that had outlived its useful life and had been sold over a quarter of a century earlier. Goodyear could not have ascertained from Minnesota law in 1981 that it had any post-sale duty to warn, much less what was required to satisfy that duty. A $4,000,000 punishment was imposed on Goodyear, not to compensate the respondent, but to punish and deter. Under these circumstances, the Due Process Clause prohibits the retrospective imposition of punishment. *See Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S., at 18-19 ("we would hesitate to approve the retrospective imposition of liability on any theory of deterrence . . . or blameworthiness") (citations omitted).

Thus, this case squarely raises the important and recurring question whether retrospective imposition of punishment—here, a $4,000,000 punitive damage award—under a newly recognized legal standard violates the Due Process Clause. This issue was before the Court in *Aetna*, but it was unnecessary for the Court to reach it and the Court did not do so. The Court noted, however, that it is an "important issue[], which, in an appropriate setting, must be resolved." 475 U.S., at 828-29. Subsequently, the Court noted probable jurisdiction in *Bankers Life*, which also raised this issue, among others, but the Court declined to reach it on prudential grounds.

Lower courts are divided over whether punitive damages may be imposed retroactively following announcement of a new legal standard. For example, in *Vigil* v. *Arzola*, 102 N.M. 682, 699 P.2d 613 (N.M. Ct. App. 1983), *rev'd in part on other grounds*, 101 N.M. 687, 687 P.2d 1038 (1984), the court recognized for the first time a cause of action in tort for retaliatory discharge but refused—as a

matter of state law—to impose punitive damages on the defendant:

> Because this new cause of action imposes significant new duties, and because of reliance on the long-standing terminable-at-will rule, we hold that the new law should be given modified prospective application. Thus, we apply the law announced to the case before us, except as to punitive damages . . . .

699 P.2d, at 621-22 (citations omitted). Similarly, the Supreme Court of Oregon refused to impose punitive damages in a case in which it created a new cause of action, reasoning that "[i]f we held that punitive damages could be awarded in the present case we would be permitting the jury to punish defendants for conduct which they could not have determined beforehand was even actionable." *Nees* v. *Hocks*, 272 Ore. 210, 536 P.2d 512, 517 (1975). The Supreme Court of Illinois, following *Nees*, has held that "punitive damages should not be awarded where, as here, the cause of action forming the basis of the award is a novel one." *Kelsay* v. *Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353, 361 (1978). Even the Supreme Court of Minnesota has, in other cases, declined to impose punitive damages in a case in which it announced a new rule of law because the defendant " 'could not have anticipated beforehand the claim would even be actionable.' " *Phipps* v. *Clark Oil & Refining Corp.*, 408 N.W.2d 569, 573 (Minn. 1987), *quoting Vigil* v. *Arzola*, 699 P.2d, at 621.

In contrast, in *Peterson* v. *Superior Court*, 31 Cal. 3d 147, 642 P.2d 1305, 181 Cal. Rptr. 784 (1982), the Supreme Court of California expressly rejected state and federal constitutional challenges to retrospective allowance of punitive damages to punish the defendant for "driving while intoxicated" even though the defendant's conduct occurred before that court's decision allowing punitive damages to be assessed in such cases. *See also Multiplex Insurance*

Agency v. *California Life Insurance Co.*, 189 Cal. App.3d 925, 235 Cal. Rptr. 12 (1987) (interpreting *Peterson* to allow retroactive imposition of punitive damages based on a new cause of action); *Grimshaw* v. *Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (rejecting defendant's "fair warning" *federal* due process argument even though the applicable standards of liability were created after the product was designed, manufactured, and purchased); *Alaskan Village, Inc.* v. *Smalley*, 720 P.2d 945 (Alaska 1986) (announcing new rule of law but imposing punitive damages and declining on state law grounds to give the new rule only prospective punitive effect). Similarly, the Supreme Court of Idaho recently announced, in a case it described as being "of first impression," that a component manufacturer has a duty to warn ultimate consumers of risks associated with the finished product's use, and, despite having created a new rule of law, affirmed an award of both compensatory and punitive damages. *Sliman* v. *Aluminum Company of America*, 112 Idaho 277, 731 P.2d 1267 (1987), *cert. denied*, 108 S. Ct. 2013 (1988).[4]

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[4] Goodyear notes that the petition for writ of certiorari filed by the Aluminum Company of America made no attempt to demonstrate the depth and breadth of this frequently recurring problem and the differing approaches to it taken by various state courts as a matter of state common law and state and federal constitutional law.

As discussed above, some state courts have expressly dealt with the issues raised by the retrospective imposition of punitive damages; however, courts often impose and affirm punitive damage awards based on new standards of conduct and new rules without considering the due process issues raised by such punishment. *See, e.g., Armada Supply, Inc.* v. *S/T Nikola*, 639 F. Supp. 1161 (S.D.N.Y. 1986) (imposing punitive damages under the Carriage of Goods by Sea Act despite the Act's express statement that "in no event shall the carrier be liable for more than the amount of damage actually sustained."); *State Rubbish Collectors Ass'n* v. *Siliznoff*, 38 Cal.2d 282, 240 P.2d 282 (1952) (recognizing cause of action for intentional infliction of serious emotional distress even if plaintiff does not suffer physical injury, and affirming punitive damages); *L.F. Pace & Sons, Inc.* v. *Travelers Indemnity Co.*,

Because tort law is constantly evolving and is for the most part judicially fashioned with very little supervision by state legislatures, it is important that this Court determine whether punitive fines may be exacted in civil tort cases in which no advance notice is given of the nature of the duty or the standard of conduct, the deviation from which provides the predicate for punishment.

B. This Court Should Decide Whether Subjecting a Defendant to Unlimited Monetary Punishment Violates the Due Process Clause of the Fourteenth Amendment

Whether the imposition of unlimited punitive damages violates the Due Process Clause was one of the issues briefed and argued in *Bankers Life* but which the Court declined to reach on prudential grounds. This recurring issue is present in this case because, as discussed in part B.2. above, the Supreme Court of Minnesota claims for itself (and for Minnesota trial courts and juries) the authority to impose punitive damages in any amount, con-

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9 Conn. App. 30, 514 A.2d 766 (1986) (affirming punitive damages for bad faith breach of contract and extending the tort beyond failure to pay insurance claim to all situations where defendant acted "tortiously" in breaching a contract); *Britton* v. *Farmers Group, Inc.*, 721 P.2d 302 (Mont. 1986) (establishing that an insurer's reliance on a polygraph test or other inadmissible evidence to deny a claim is "bad faith" and affirming punitive damage award); *Nicholson* v. *United Pacific Insurance Co.*, 710 P.2d 1342 (Mont. 1985) (creating a covenant of good faith in all contracts and affirming punitive damage award for breach of a commercial real estate contract); *K-Mart* v. *Ponsock*, 732 P.2d 1364 (Nev. 1987) (recognizing a tort cause of action for "bad faith discharge" of an employee for the improper motive of defeating retirement benefits and affirming punitive damage award); *Kirk* v. *Safeco Insurance Co. of America*, 28 Ohio Misc. 44, 273 N.E. 2d 919 (1970) (nonjury trial in which an Ohio judge established right to punitive damages for breach of an insurance contract); *Atlas Chemical Industries, Inc.* v. *Anderson*, 514 S.W. 2d 309 (Tex. Civ. App. 1974) (establishing strict liability for intentional hazardous polluting and affirming punitive damage award).

sidering only whether the award will effectuate in some nebulous fashion the retributive and deterrent purposes of punitive damages. In Minnesota, as in other jurisdictions, the "open-ended and volatile nature of punitive damages," App. A, 16a, 426 N.W.2d, at 835, has resulted in a fundamentally unfair system of punishment that resembles a lottery in which defendants can neither predict the conduct that will subject them to liability nor ascertain *in advance* the amount of punishment to which they might be subjected.[5]

This case squarely raises an important issue that the Court declined to reach in *Bankers Life*. Justice O'Connor, in a concurring opinion joined by Justice Scalia, observed that the essentially unconstrained discretion vested in juries to award "unlimited" punitive damages "may violate the Due Process Clause," 108 S. Ct., at 1655, and that "the grant of wholly standardless discretion to determine

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[5] The lack of a legislatively established maximum punitive fine is compounded by the non-compensatory nature of punitive damages. Unlike compensatory damages, which are limited by the amount of damage actually done by the defendant, no "compensatory purpose limits the amount of the fine." *Hicks* v. *Feiock*, 108 S. Ct. 1423, 1437 (1988) (O'Connor, J., dissenting). Punitive damages are imposed by juries on a wholly subjective basis to regulate the future behavior of defendants and to express social outrage at the defendant's past conduct. *See Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 276 n.3 (Powell, J., dissenting). *See also Bankers Life*, 108 S. Ct., at 1655 (O'Connor, J., concurring in part and concurring in the judgment) (noting the lack of objective factors limiting jury discretion to determine the amount of punitive damage awards). Minnesota's punitive damage statute lists a number of virtually meaningless factors to be considered in determining the level of punishment needed to achieve the retributive and deterrent purposes of punitive damages. *See Minn. Stat.* § 549.20 (1987), App. K, 69a. Some of these factors, such as "the seriousness of the hazard to the public," illustrate the essentially legislative nature of the task that juries are asked to perform when imposing punitive damages. Other factors, like the "financial condition of the defendant," raise constitutional problems in and of themselves. *Cf. Robinson* v. *California*, 370 U.S. 660 (1962) (punishment of "status" held unconstitutional).

the severity of the punishment appears inconsistent with due process." *Id.*, at 1656. Justice O'Connor further suggested that this due process issue is one "that is worthy of the Court's attention in an appropriate case." *Id.*, at 1655.

This Court has, not surprisingly, expressed grave concerns over the literally unfettered discretion given to juries and courts to impose punitive damages in unlimited amounts on other occasions as well. In *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 50 (1979), the Court observed:

> Because juries are accorded broad discretion both as to the imposition and the amount of punitive damages, the impact of these windfall recoveries is unpredictable and potentially substantial.

See also Gertz v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused"). Similarly, in his dissenting opinion in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 82-83 (1971), Justice Marshall commented that punitive damages

> [u]nlike criminal penalties, however, . . . are not awarded within discernible limits but can be awarded in almost any amount . . . these damages are the direct product of unlimited jury discretion . . . . The manner in which unlimited discretion may be exercised is plainly unpredictable.

See also id., at 84 ("the essence of the discretion is unpredictability and uncertainty); *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (1981) ("the impact of such an award is likely to be unpredictable and, at times, substantial"). As illustrated by this case, judges exercising essentially the same untrammeled discretion to punish may be expected to produce the same arbitrary results.

The establishment of a maximum punishment for a given offense has long been recognized as a quintessentially legislative task. *See United States* v. *Evans*, 333 U.S. 483, 486-87 (1947); *United States* v. *Grimaud*, 220 U.S. 506, 522 (1911). *Cf. United States* v. *Hudson*, 11 U.S. (7 Cranch) 32 (1812). This Court has acknowledged that "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." *United States* v. *Batchelder*, 442 U.S. 114, 123 (1979). The discretion to impose criminal punishment must be circumscribed by provisions that specifically "demarcate the range of penalties" and "inform . . . the courts, prosecutors, and defendants of the permissible punishment alternatives available . . . ." *Id.*, at 126. These principles are deeply rooted in our jurisprudence, and can be traced to the ancient Latin canon, "Nullum crimen, nulla poena, sine lege," the modern translation of which is: "there can be no crime, *and no punishment*, except as the law prescribes." M. Frankel, *Criminal Sentences* 3 (1972).

This same analysis must be applied to punitive damage awards because no principled constitutional distinction may be drawn between fines imposed to punish and deter based on whether they are labeled "criminal" or "civil." The protection of the Due Process Clause "is not to be avoided by the simple label the State chooses to fasten on its conduct or its statute." *Giacco* v. *Pennsylvania*, 382 U.S. 399, 402 (1966). *See also Ingraham* v. *Wright*, 430 U.S. 651, 669, n.37 (1977) ("Some punishments though not labeled criminal by the State may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment."); *Burgess* v. *Salmon*, 97 U.S. (10 Otto) 381, 385 (1878) ("the *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal.").

Although state legislatures, including Minnesota's, have strictly observed this principle of fair warning with respect to conduct defined as criminal by establishing upper limits on criminal fines and wholly rejecting the *ad hoc* imposition of unlimited criminal fines by courts and juries, *see, e.g., Minn. Stat.* ch. 54 (1873), *as amended*, Minn. Stat. chs. 609, 624 (1987) (general codification of crimes imposing maximum fines for a variety of offenses), such has not been the case with punitive damage awards imposed under state tort law regimes. Most state statutes authorizing punitive damages simply give *carte blanche* to impose punitive awards in any amount. In a constitutional system that otherwise promises protection from capricious and extreme governmentally imposed punishments, this invitation to governmental arbitrariness is a most troubling aberration which warrants the attention of this Court in this case.

C. This Court Should Decide Whether the Excessive Fines Clause of the Eighth Amendment Applies to Civil Punitive Damage Awards and Whether the Award in This Case Is Excessive

This Court has acknowledged that "whether the Eighth Amendment's Excessive Fines Clause serves to limit punitive damages in state civil cases . . . is a question of some moment and difficulty." *Bankers Life*, 108 S. Ct., at 1651. This question was briefed and argued in *Bankers Life* and in *Aetna*. The arguments advanced to the Court in those cases are fully applicable to this case because, as the Supreme Court of Minnesota recognized, the "public" purpose of punitive damages is "to punish the defendant . . . ." App. A, 20a, 426 N.W.2d, at 837.

Because punitive damages undeniably constitute "punishment for past conduct," they should be subject to the constraints of the Excessive Fines Clause. *Cf. City of Yonkers* v. *United States*, No. A-175, slip op., at 9 (Sept. 1, 1988) (Marshall, J., concurring) (slip op. issued in com-

panion cases in *Spallone* v. *United States*, Nos. A-172, -173, -174 & -175). The punitive damage award here, $4,000,000, far exceeds the maximum punishment established by the Minnesota legislature for similar conduct that has been adjudged to be a crime. Goodyear was assessed with a $4,000,000 punitive fine by the Supreme Court of Minnesota for "deliberately downplaying" the hazards of misusing the KWX rim. App. A, at 18a, 426 N.W.2d, at 836. Had Goodyear been charged under Minnesota's Consumer Fraud Act, Minn. Stat. § 325F.69 (1987), which prohibits "[f]raud, misrepresentation, [and] deceptive practices . . . in connection with the sale of any merchandise," *id.*, subdiv. 1, and found guilty thereunder, it would have been subject to a maximum fine of $3,000 for committing a gross misdemeanor. *Id.*, subdiv. 2(6); *id.*, § 609.02, subdiv. 4 (establishing maximum fines for gross misdemeanor). Thus, the punitive damage award in this case is over 1,000 times the maximum punishment established by the Minnesota legislature for misleading or deceptive statements concerning a product—essentially the misconduct for which Goodyear was punished. Such a fine, imposed by an appellate court subject to no maximum limitation as to size, is without doubt excessive under the Eighth Amendment standards interpreted and applied in *Solem* v. *Helm*, 463 U.S. 277 (1983). The Excessive Fines Clause question was properly presented below and should be given plenary consideration.

D. This Case Implicates None of the Prudential Concerns Articulated by the Court in *Bankers Life*

In *Bankers Life*, this Court articulated several prudential concerns regarding the exercise of its discretionary jurisdiction over the constitutional challenges to punitive damages presented in that case. Those concerns are not present here. In *Bankers Life*, the Court refrained from addressing constitutional challenges to a $1,600,000 punitive damage award in view of "possibly more appropriate resolutions" of the issues posed by such staggering and increasingly

frequent awards. 108 S. Ct., at 1651. The Court expressed the hope that state legislatures might act, *id.*, and in doing so cited a number of state statutes in which legislatures imposed some limits on punitive damage awards in specific types of civil cases.[6] Despite, however, the warning sounded almost two and one-half years ago in *Aetna*, state legislatures have done almost nothing to impose meaningful controls on punitive damage awards.

For example, in 1986 the Minnesota legislature enacted a "tort reform" bill, Chapter 455 of the Laws of Minnesota, which, *inter alia*, added a section concerning the pleading of claims for punitive damages. That legislation did not, however, otherwise deal directly with punitive damage awards. In 1988, the Minnesota legislature amended certain sections of the 1986 tort reform law but once again set no limits on the recovery of punitive damages. Thus, the response of the Minnesota legislature to the suggestion of constitutional concerns mentioned by this Court in *Aetna* in 1986 and again when probable jurisdiction was noted in *Bankers Life* in March 1987 has been to make minor adjustments to the law of torts in Minnesota but not to address the fundamental issues presented by the case at bar.

In *Bankers Life*, the Court expressed the hope that, failing legislative action—as here—the state courts might

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[6] 108 S. Ct., at 1651 n.3, *citing, e.g., Cal. Civ. Code Ann.* § 1787.3 (West 1985). This footnote in *Bankers Life* failed to recognize that the California statute which generally authorizes the recovery of punitive damages in civil actions, *Cal. Civ. Code* § 3294, was substantially amended on September 30, 1987 as part of a larger "tort reform" bill. In the process of amending § 3294, the California legislature did not act to place limits on such awards. *See* Senate Bill No. 241, enacted as ch. 1498, Acts of the California Legislature (Sep. 30, 1987). The fruits of such unbridled discretion are illustrated by the $14,000,000 punitive damage award discussed in the Application for Stay in *Metromedia, Inc.* v. *April Enterprises, Inc.*, No. A-242, *stay granted*, Oct. 11, 1988, *pet. for cert. filed*, Oct. 14, 1988.

resolve these issues through reliance on their state constitutions or other non-federal grounds. 108 S. Ct., at 1651. Although a plurality of the Supreme Court of Georgia had already done so in a case recently on this Court's docket,[7] the Minnesota courts in this case shunned that opportunity. At each stage of this case, Goodyear invoked—to no avail—appropriate provisions of the Minnesota Constitution.

The Minnesota courts are not alone in their apparent indifference to these important constitutional issues. In *April Enterprises* v. *Metromedia, Inc.*, No. B022890 (Cal. Ct. App. June 9, 1988) (unpublished opinion), No. A-242, *stay granted*, Oct. 11, 1988, *pet. for cert. filed*, Oct. 14, 1988, the California Court of Appeal affirmed a punitive damage judgment of $14,000,000. After both parties had, on rehearing, joined issue in the Court of Appeal on the import of *Bankers Life* for the punitive damages system, the defendant's state and federal constitutional claims were once again rejected by the Court of Appeal. With a single dissenting vote, the Supreme Court of California refused even to grant review of the largest punitive damage award ever affirmed on appeal in that state. In a similar vein, on April 21, 1988 the United States Court of Appeals for the Second Circuit affirmed a $6,000,000 punitive damage award in an opinion devoting four sentences to the defendants' argument that the award was excessive under the Eighth Amendment. *Kelco Disposal, Inc.* v. *Browning-Ferris Industries*, 845 F.2d 404 (2d Cir. 1988), No. 88-

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[7] *Colonial Pipeline Co.* v. *Wright Contracting Co.*, No. 87-2007, *dism'd for want of juris.*, Oct. 3, 1988. The judgment in that case did not appear to be final for purposes of the exercise of this Court's appellate jurisdiction. This Court also has on its docket another case, *Nationwide Mutual Insurance Co.* v. *Clay*, No. 88-157, *pet. for cert. filed*, July 27, 1988, which presents several of these issues. These issues are also presented by the petitioner in *CNA Casualty of California* v. *Rouche*, No. 88-297, *pet. for cert. filed*, Aug. 18, 1988.

556, *pet. for cert. filed*, Oct. 1, 1988.[8] Fully six weeks after the decision in *Bankers Life*, the Eleventh Circuit responded to this Court's invitation by rejecting—albeit in *dicta*—the Eighth Amendment's applicability to punitive damage awards, viewing the question, as many courts have viewed it, as foreclosed by the Court's decision in *Ingraham* v. *Wright*, 430 U.S. 651 (1977).[9] *Electro Services, Inc.* v. *Exide Corporation*, 847 F.2d 1524, 1530 (11th Cir. 1988). And on September 30, 1988, the Supreme Court of Alabama followed suit, holding that "punitive damages awarded in a civil proceeding are not subject to the constitutional restrictions of the Eighth Amendment, which applies to criminal proceedings only." *Industrial Chemical & Fiberglass Corp.* v. *Chandler*, Nos. 86-381 & 86-385 (Ala. Sept. 30, 1988), slip op., at 9.

State legislatures and lower courts have repeatedly declined to respond to concerns such as those suggested by this Court in *Aetna* and *Bankers Life*, and have, consequently, refused to ameliorate the serious constitutional difficulties posed by punitive damages. It is apparent that state legislatures will not enact limits on punitive damages and that state courts will continue to regard federal con-

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[8] In its opinion, the Second Circuit was prepared to assume the applicability of the Eighth Amendment but went on to hold that the award would not in any event be violative of the Eighth Amendment if that assumption were correct.

[9] In this respect, the Eleventh Circuit joined a number of other courts that have, without any reasoned analysis, concluded that *Ingraham* v. *Wright*, 430 U.S. 651 (1977), is dispositive against applying the Eighth Amendment's proscriptions to punitive damage awards. *See, e.g., Federal Deposit Insurance Co.* v. *W.R. Grace & Co.*, No. 84-5031 (N.D. Ill. June 6, 1988); *Downey Savings and Loan Association* v. *The Ohio Casualty Insurance Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987), *cert. denied*, 108 S. Ct. 2023 (1988); *Palmer* v. *A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984); *Tetuan* v. *A.H. Robins Co.*, 241 Kan. 441, 738 P.2d 1210 (1987); *Unified School District* v. *The Celotex Corp.*, 6 Kan. App. 2d 346, 629 P.2d 196 (1981); *Underwriters Life Insurance Co.* v. *Cobb*, 746 S.W.2d 810 (Tex. Civ. App. 1988).

stitutional challenges to punitive damage awards as precluded by this Court's jurisprudence in cases such as *Ingraham* v. *Wright*. The time has surely come for the Court to follow through on its clear warnings to state courts and legislatures by setting this case for argument and plenary consideration.

CONCLUSION

The questions presented by Goodyear are substantial and recurring. Punitive damages in severe and excessive amounts, imposed for violating vague and unannounced substantive standards of conduct, are wreaking havoc within the civil justice system throughout this Nation. The Petition should be granted and these questions set for plenary consideration.[10]

October 14, 1988

Respectfully submitted,

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[10] If the Court desires to consider together the full panoply of federal constitutional questions posed by punitive damage awards, this case should be set for argument in tandem with *Metromedia, Inc.* v. *April Enterprises, Inc.*, No. A-242, *stay granted*, Oct. 11, 1988, *pet. for cert. filed*, Oct. 14, 1988. Counsel for Goodyear herein are also counsel for petitioner Metromedia, Inc. in that case.

APPENDIX

APPENDIX A

STATE OF MINNESOTA
IN SUPREME COURT

C3-87-419, C2-87-511

Hennepin County — Simonett, J.
Took no part, Coyne, J.

Dale L. Hodder,

Respondent (C3-87-419),
Appellant (C2-87-511),

vs.

The Goodyear Tire & Rubber Company, et al., defendants, petitioners,

Appellants (C3-87-419),
Respondents (C2-87-511),

Pioneer Rim & Wheel Company,
Respondent,

and

The Goodyear Tire & Rubber Company, defendant and third party plaintiff, petitioner,

Appellant (C3-87-419),
Respondent (C2-87-511),

vs.

Remer Oil Company, Inc., third party defendant,

Respondent,

and

Pioneer Rim & Wheel Company, defendant and third party plaintiff,

Respondent,

vs.

Acheson Tire Company, third party defendant,

Respondent,

Arrowhead Equipment Company, third party defendant,

Respondent,

Itasca Tire Company, third party defendant,

Respondent.

Filed May 6, 1988
Office of Appellate Courts

SYLLABUS

1. Minn. Stat. § 604.03 (1986), the useful life defense, is not a statute of repose. In this case, the manufacturer had a continuing duty to warn and this issue was adequately submitted to the jury. Other evidentiary rulings were proper.

2. Punitive damages, based in part on an erroneous theory, are reduced. The employer's recovery for medical expenses under Minn. Stat. § 176.061, subd. 7 (1981), is calculated within the subdivision 6 formula.

3. No valid settlement offer was made under the offer-counteroffer provision of the prejudgment interest statute, and, therefore, preverdict interest applies to the entire compensatory judgment.

Affirmed in part, reversed in part, and remanded with directions.

Heard, considered, and decided by the court en banc.

OPINION

SIMONETT, Justice.

This products liability case raises a variety of issues, including interpretation of the statutory "useful life de-

fense," the duty to warn, and entitlement to punitive damages. Issues on allocation of a tort recovery between the injured employee and subrogated employer, as well as on prejudgment interest, are also presented. We affirm, for the most part, except for a reduction in punitive damages and a remand for reallocation of the tort recovery and readjustment of interest.

On December 19, 1981, plaintiff Dale Hodder, age 17, was seriously injured when the metal rim of a truck tire explosively separated while he was mounting the tire on a customer's logging truck. Hodder was then employed by Remer Oil Company, a service station in the small community of Remer in northern Minnesota. Hodder remembers he was to fix a flat tire on the truck but remembers little else.

The tire that exploded was mounted on a KWX multipiece rim assembly made by defendant Goodyear Tire & Rubber Company.[1] This assembly consists of a heavy metal rim base, about which the tire with an inner tube is placed, plus a separate metal side ring that attaches to the rim. The rim base is split to facilitate getting the tire on and off; on assembly, the split ends must be carefully realigned and the side ring then fastens to and helps lock the rim base. There were other tires on the truck with an "L-type" rim. The L-type, in contrast with the K-rim, has a solid rim base but the side ring is split.

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[1] The flat tire Hodder was to fix was apparently an inner dual wheel. What is uncertain is whether the KWX rim was on the inner or outer dual. The jury could have found the accident happened one of two ways. The first version assumes the KMX rim was on the flat inner dual. Hodder had removed, repaired, and reassembled the flat tire and the repaired tire exploded as Hodder was remounting the wheel to its inner duel position. The second version assumes the KWX rim was on the nonflat outer dual. Hodder had removed this wheel to get at the flat inner dual (which had an L-type rim), and the outer dual wheel exploded as Hodder was remounting it after having remounted the repaired inner dual.

The K-rim which injured Hodder was manufactured in 1955, 26 years before the accident. The rim was corroded and worn but there was also evidence the component parts were in serviceable condition at the time of the explosion. Goodyear had been making K-rims since the 1920's, and possibly a quarter million are still in circulation. Manufacture of the KWX was discontinued in 1962. After 1955, Goodyear became aware of the danger of pressurized separation of its multi-piece rim assemblies. By the 1970's, Goodyear was using safety films, posters, manuals, advertising, and promotion of OSHA standards to make known information on maintenance and repair of K-rims and to warn about dangers associated with misassembly or use of worn parts. Hodder never saw any of this material.

In 1955, Goodyear was producing and selling K-rims and L-rims. The KWX rim (the kind involved in Hodder's accident) was a K-rim with a lighter rim base, put on the market in 1955, apparently for use, as was the L-rim, for lighter load trucks; however, in later years both the KWX and the L-rim came to be used generally on heavier load trucks. A single-piece rim was invented in 1953 but not until some years later did it gain acceptance in the industry and on the market.

Dale Hodder sued Goodyear and its subsidiary, Motor Wheel Corporation, and the defendants, in turn, brought in Remer Oil Company, plaintiff's employer, as a third party defendant. Remer Oil counterclaimed for benefits it was required to pay for its employee under the Workers' Compensation Act.

During trial, plaintiff dropped its claim of a manufacturing defect. The jury, answering special interrogatories, found no design defect in the K-rim; no negligence on Hodder; 42.5 percent causal negligence each on Goodyear and Motor Wheel, and 15 percent negligence on Remer Oil. Goodyear and Motor Wheel's negligence was found to

be for failure to warn. The jury awarded compensatory damages of $3,368,916 and punitive damages of $12.5 million. The jury also found that the "useful life" of the involved KWX rim had expired at the time of Hodder's accident and that Hodder was not negligent in failing to determine that the useful life had expired. Goodyear and Motor Wheel appeal from a denial of their post-trial motions and the judgment, and Hodder appeals the allocation of his tort recovery and an interest item. We granted accelerated review to this court.

I.

Minn. Stat. § 604.03, subd. 1 (1986), provides that in a products liability action, "it is a *defense* to a claim against a designer, manufacturer, distributor or seller of the product or a part thereof, that the injury was sustained following the expiration of the *ordinary useful life* of the product." (Emphasis added.) Subdivision 2 states, "The useful life of a product is not necessarily the life inherent in the product, but is the period during which with reasonable safety the product should be useful to the user." The subdivision goes on to say this period "shall be determined by reference to the experience of users of similar products," and then lists some of the factors to be taken into account.[2]

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[2] Subdivision 2 of section 604.03 reads in its entirety:

> The useful life of a product is not necessarily the life inherent in the product, but is the period during which with reasonable safety the product should be useful to the user. This period shall be determined by reference to the experience of users of similar products, taking into account present conditions and past developments, including but not limited to (1) wear and tear or deterioration from natural causes, (2) the progress of the art, economic changes, inventions and developments within the industry, (3) the climatic and other local conditions peculiar to the user, (4) the policy of the user and similar users as to repairs, renewals and replacements, (5) the useful life as stated by the designer, man-

In this case the statute was read to the jurors, and, in answer to special questions, the jury found that the K-rim's useful life had expired and Hodder was not negligent in failing to have determined the useful life had expired. In denying Goodyear's post-trial motions, the trial court ruled that the useful life defense was inapplicable because, the jury having found the K-rim was not accompanied by adequate warnings, there never was a period during which with reasonable safety the rim was useful to the user. In other words, by the statute's own definition, the K-rim never had a useful life.

Hodder, of course, agrees with the trial court's ruling. Alternatively, Hodder argues the useful life defense is simply one factor for the jury to consider in determining fault. Goodyear, on the other hand, says the useful life defense is just that, a defense, a complete bar to any injury occurring after the useful life of the product has expired. Both parties select remarks made in the legislative hearings on the useful life defense which support their position. We think the legislative history is inconclusive, but this much is certain: The legislature was concerned about expanding products liability and intended to limit open-ended liability for aging products. The question for us is to what extent that purpose has been accomplished.

Section 604.03 is not a typical statute of repose. A statute of repose starts the limitation period for bringing an action from the date of manufacture or sale of the product, unlike a statute of limitations which starts from the date of injury. A typical statute of repose will specify a presumptive number of years after which an action cannot be brought.[3] Here, however, the limitation period is deter-

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ufacturer, distributor, or seller of the product in brochures or pamphlets furnished with the product or in a notice attached to the product, and (6) any modification of the product by the user.

[3] Six states have useful or anticipated life provisions in their products

mined by the trier of fact after injury occurs. The jury makes this determination by "reference to users of similar products," and takes into account, among other things, natural deterioration, progress of the art, climatic and other peculiar local conditions, repair practices, the useful life as specified by the manufacturer, and any user modification.

The statute's useful life concept is ambiguous. It is not clear if useful life refers to the life of the particular product involved which caused the injury, or if the life of that particular product is to be measured by the useful life of all like products made by that particular manufacturer, or by the life of some generic product or industry norm. The statute seemingly tries to encompass all three approaches, but this presents problems. The particular product involved in the accident may conceivably have several different life spans depending on which measurement is used.

There are other problems. The statute surely is meant to cover a product originally nondefective but which becomes "defective" with age. But how long must a product last to avoid being labelled originally defective? Does the statute also cover an originally defective product? A product may be defective *ab initio*, but not cause injury until

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liability statutes. In five states, the useful life is coupled with a presumptive period (or, in Connecticut, is an exception to a statute of repose) and expiration of the useful life unambiguously bars recovery. Conn. Gen. Stat. § 52-577a (1987); Idaho Code, § 6-1403(2) (Supp. 1987); Kan. Stat. Ann. § 60-3303 (1983); Tenn. Code Ann. § 29-28-103 (1980); Wash. Rev. Code § 7.72.060 (Supp. 1987). Arkansas explicitly provides that use of a product beyond its "anticipated life" is an element of comparative fault. Ark. Stat. Ann. § 16-116-105 (1987). Minnesota appears to be the only state that simply labels expiration of useful life as a "defense."

One effect of a statute of repose is that it has the potential of barring recovery even before the cause of action accrues. This raises constitutional questions, briefed by the parties, but which we do not reach.

the normal life span of a nondefective like product expires. If these products are not covered, as the trial court ruled, the useful life statute is irrelevant to most products liability claims.

These problems, in turn, raise questions about the role of the user of the product (who may be the owner, a temporary user, or a hypothetical average person) in determining the product's useful life. Hodder points out the useful life definition relies on many of the same factors used to prove design defect, manufacturing defect and failure to warn, with the odd result that the same evidence is used to support a cause of action and to defeat it. Nevertheless, this may be exactly what the legislature intended. But Hodder also seems to say that the useful life defense incorporates a "reasonable person" standard of care, *i.e.*, the defense is not operative unless the plaintiff user knows or should know the product is no longer reasonably safe to use. Goodyear counters by saying section 604.03 must be viewed as a statute of repose, *i.e.*, the defense focuses entirely on the condition of the product and has "nothing to do with a person's conduct." Further, because the defense applies to "any action," even a user's injury attributable to a manufacturer's failure to warn is barred after the product's useful life has expired.

Notwithstanding Goodyear's claim, it seems to us that section 604.03 does have something to do with the particular person who is using the particular product. Useful life is the period the product is "useful to the user." *Id.*, subd. 2. A factor to be considered is "the policy of the user * * * as to repairs, renewals and replacements." *Id.* Another factor is "any modification of the product by the user." *Id.* A review of the legislative hearings also suggests that the legislature thought the obviousness of a product's deterioration to the particular user might be a consideration in determining useful life.[4] Significant, too,

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[4] For example, Senator Spear inquired in committee how the con-

is the fact that the legislature first considered and abandoned a true 15-year statute of repose, H.F. 338, § 3, 70th Legis., 1977 (second House reading, April 18, 1977), and instead adopted a useful life concept derived from a 1977 federal task force study on products liability. *See* U.S. Dept. of Commerce, *Final Report, Interagency Task Force on Product Liability* (1977). The final report, with cursory analysis, endorsed the useful life concept, but the task force's legal study specifically recommended only that manufacturers utilize a notice disclaiming liability for a product after a specific period of time. The legal study contrasted the "useful-life-disclaimer approach" with more "drastic" statutes of repose, reasoning that "[i]f a claim is to be barred before the injury occurs, it seems more equitable to ensure that the employee or consumer knows that he is using the product at his own risk, and that if he is injured, there will be no recovery against the manufacturer." *Id.* at 28-29. Interestingly, section 604.03, subd. 2, includes among the factors determining useful life the manufacturer's notice of the product's useful life.

This much is clear. There will be cases where a reasonably prudent user should know a product's useful life has expired and instances where the user has no reason to know nor way of knowing. Goodyear argues that in either case, the user is barred from recovery. We decline to adopt this construction. Expiration of useful life is a defense but we think the legislature has stopped short of saying it is an absolute defense, and it is not for us to

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sumer determines when useful life ends, and "what * * * a prudent consumer [does] under this kind of a provision to take reasonable precautions not to use a product when useful life has worn out." (Committee Hearing, Feb. 1, 1978). Senator Davies responded with a hypothetical lawnmower user who allows the muffler to rust off but continues using the mower until he becomes deaf. The user would have no claim for ear damage against the lawnmower or muffler manufacturer. The clear implication is that the deterioration was obvious to the user, who failed to exercise reasonable care in continuing to use the product.

take that step, especially in view of the mixed signals given by the statute.

We hold, therefore, that the expiration of a product's useful life under section 604.03 is a factor to be weighed by the jury in determining the fault of the manufacturer and the fault of the user. In other words, the statute emphasizes to the trier of fact the importance, in determining comparative liability, of considering whether the product has outlived its useful life. Section 604.03 should be read to the jury as part of its instructions, perhaps with a prefatory statement that the statutory defense, if found to be applicable, is to be considered, along with other factors, in evaluating the conduct of the manufacturer and the user. There is no need for separate special verdict questions as were given in this case on useful life. The jury's evaluation of the useful life defense will be reflected in its answers to the special verdict questions on fault.

In this case, the jury found, in answer to a superfluous question, that the K-rim's useful life had expired. This answer is not inconsistent with the jury's findings of fault. The jury would have weighed the useful life expiration along with all the other liability aspects of the case in finding Hodder not negligent, Goodyear negligent, and in comparing Goodyear's fault with Remer Oil's fault. This was proper.

How to limit open-ended liability for aging products is perplexing. The useful life approach seems, at first glance, attractive, but as one commentator has noted, on closer study, these statutes "seem incoherent both theoretically and operationally." Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U.L. Rev. 796, 848 (1983). Indeed, the author wonders if it is possible to devise a workable repose statute that measures the time period by a useful life concept. It may be that such a statute is feasible, but until that time arrives, the courts

apparently, as Professor Schwartz suggests, will simply have to monitor motions for directed verdicts closely in cases of aging products.

II.

The jury was asked whether Goodyear was negligent because it knew or reasonably could have discovered the danger involved in the use of the KWX rim, and the KWX truck rim was not accompanied by adequate warnings. The jury answered the question "yes" and then found this negligence was a cause of Hodder's injuries.[5] Goodyear contends that it had no post-sale, continuing duty to warn; but if it did, it complied with that duty; but in any event any failure to warn was not a cause of Hodder's injuries.

If safety hazards in the use of K-rims did not become known to Goodyear until after 1955, after the K-rim which injured Hodder was made and sold, did Goodyear have a post-sale duty to warn Hodder and other similar users? We have not had occasion to deal with this question before. Jury instruction Guide 119 says a manufacturer is obligated to keep informed of scientific knowledge and discoveries in its field, and a committee comment states that "the knowledge should be judged at the time the product in question is manufactured." 4 Minn. Dist. Judges Ass'n,

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[5] Similar questions were submitted for defendant Motor Wheel Corporation and answered affirmatively, the jury then assigning 42.5 percent causal fault to Goodyear and 42.5 percent to Motor Wheel. The defendants argue that because Motor Wheel did not manufacture or sell the KWX rim, it had no duty to warn of the product's danger. Motor Wheel manufactures a variety of wheel products but not K-rims, but it became a wholly-owned subsidiary of Goodyear in 1964 and thereafter handled the marketing of the K-rim. The evidence amply established that Motor Wheel assumed a duty to warn about K-rims, which it shared with Goodyear. We hold the trial court did not err in submitting duty to warn as to Motor Wheel. In this opinion, for brevity, whenever we refer to Goodyear, this includes Motor Wheel, unless the context or text otherwise indicates.

Minnesota Practice, JIG 119 (3d ed. 1986). Goodyear argues this means post-sale knowledge of danger is not a basis for a duty to warn. JIG 119 seems to be drafted with time-of-sale warnings primarily in mind, but it does not purport to preclude a post-sale duty to warn nor to declare what the law might be on that subject.

On the facts of this case, we hold that a continuing post-sale duty to warn existed and was adequately submitted. *Cf. Comstock v. General Motors Corp.*, 358 Mich. 163, 99 N.W.2d 627 (1959). Hundreds of thousands of K-rims have been used in millions of tire changes over the years without incident; of the 134 or so K-rim explosions which did occur, many are explained by improper servicing or misuse. Goodyear steadfastly maintains its K-rim is a safe product if used properly. Nevertheless, it became evident by the late 1950's that K-rims could be temperamental; that the margin for error in servicing the K-rim assembly was dangerously small and it might explosively separate with seemingly little provocation; that when explosions did occur, serious injury or death usually resulted; and, therefore, that great care was required in the handling and servicing of K-rims. Further, Goodyear has continued over the years in the tire rim business, and, although all K-rim production was discontinued by 1969, Goodyear continued to advertise its K-rims as late as 1977, and has continued to sell tires and tubes for use with used K-rims. Finally, Goodyear undertook a duty to warn of K-rim dangers. Under these circumstances, it seems to us that Goodyear had a continuing duty to instruct and to warn, so that users of used K-rims would be apprised of safety hazards which, at an earlier time, were not fully appreciated. A continuing duty to warn arises only in special cases. We think this is such a case.

The trial court instructed the jury, using the JIG instruction, that if there was a duty to warn, "and if the KWX truck rim was not *accompanied* by adequate warnings and instructions, *then* Goodyear/Motor Wheel *is* neg-

ligent." (Emphasis added.) This instruction, contends Goodyear, in effect directed a finding of negligence because, admittedly, there was no warning on Hodder's K-rim. In other words, Goodyear construes the word "accompany" to mean the warning must be affixed to or somehow go along with the tire rim. Goodyear argues persuasively that affixing warnings to the rim itself, having in mind the rough wear to which rims are put, was impractical; and, anyway, that the rim injuring Hodder was already in circulation. Moreover, argues Goodyear, the trial court's instruction made irrelevant all the evidence it introduced of its subsequent warning efforts made through safety films, posters, manuals, and advertising. We concede, in the context of this case, that the word "accompany" is inapposite, but we are satisfied that as the evidence was adduced and the arguments were made during this long trial, the jury did not give a narrow, technical interpretation to the court's instruction but understood the warnings, as JIG 119 states, were to be "set out in such a way" as to "catch the attention" of the ordinary user.

Goodyear also says it had no duty to warn because Hodder knew or should have known of the K-rim danger. While Hodder had received training in the servicing of multipiece rims, his appreciation of the inherent dangers involved was not so perfect as to absolve Goodyear as a matter of law of its duty to warn.[6]

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[6] The 1973 Smith internal company report states in part:

> In the eyes of the user community, the [K-rim] part is a secondary component. It is a sturdy, heavy part, made of steel. He, therefore, thinks it has an unlimited useful life. * * * *
>
> We have expert knowledge with regard to maintenance. Such information is published, but the information may not reach the involved user. If it does, he apparently doesn't see any reason for it. We do not follow up published information with personal contact to show how and the reason why.
>
> We have expert knowledge with regard to serviceability (pos-

Goodyear did, in fact, recognize a continuing duty to warn and, by the late 1970's, before Hodder's accident, it distributed warnings and instructions by means of safety films, posters, manuals, and advertising. The jury, however, could have found that Goodyear's warnings were inadequate to reach K-rim users. We hold the jury's finding that Goodyear was negligent in performing its duty to warn is sustained by the evidence. While a closer question, we also hold the jury could find that breach of this duty was a cause of Hodder's injuries. *Cf. Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 99 (Minn. 1987).

III.

The jury found Remer Oil 15 percent at fault. Goodyear argues that the percentage of fault would have been greater but for erroneous jury instructions. Remer, on the other hand, by notice of review, contends as a matter of law it was not at fault.

Hodder may or may not have changed a flat tire mounted on a K-rim, depending on which version of the accident the jury accepted. *See* footnote 1, *supra*. If the K-rim was on the outer, nonflat dual, there was evidence (fresh hammer marks on the rim) indicating Hodder had improperly hammered the rim to return the wheel to the axle. If the K-rim was on the flat inner dual, there was evidence Hodder had improperly serviced the rim. In either event, Remer Oil's negligence in training Hodder was a fact issue. The trial court also instructed the jury, over Goodyear's objection, that Remer Oil's possible OSHA vi-

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sibly negative type of knowledge). Such information is not detailed in our publications. The involved user cannot tell a "good" part from a "bad". He doesn't believe the part won't function (provide support for the tire). He doesn't believe it will endanger him. Even if he feels it is unserviceable, he may not be able to replace it due to owner['s] or his bosses['] instructions; or a replacement may not be available. He may be willing to take a chance because he can't afford a new rim, or he's in a hurry.

olations were excused if Remer had justification for being unaware of the regulations. This was not error. *See* Restatement (Second) of Torts § 288A (1965). Remer Oil's justification for being ignorant of the OSHA regulations was a fact for the jury to consider and the jury was not forced, as Goodyear contends, to absolve Remer of liability because it was unaware of the OSHA regulations.

We find no error either in various evidentiary rulings challenged by Goodyear. Evidence of 134 post-1955 K-rim explosion accidents was offered by Hodder. This evidence was relevant on notice to Goodyear of the K-rim's dangerous propensities and the warnings needed. The fact other accidents may have been caused by misuse does not diminish their relevance on failure to warn. *Cf. Wagner v. International Harvester Co.*, 611 F.2d 224, 230-31 (8th Cir. 1979). We think, too, a sufficient foundation for admission of testimony about the other accidents was laid (7 days of pretrial were devoted to foundation), and, while Hodder's expert gave only summaries of the accidents, Goodyear extensively cross-examined the expert using the full files. In admitting the reports of other accidents, the trial court did not exceed its allowable discretion.

In 1979 Lynn Bradford, acting director of the Office of Defects Investigation in the United States Department of Transportation, wrote a letter to Goodyear strongly recommending that Goodyear voluntarily recall the remaining K-rims from service. Goodyear considered initiating a recall but then declined, apparently disagreeing whether the K-rim had, as Bradford put it, "an inherent safety defect." The trial court admitted the Bradford letter over Goodyear's objections that it was only Bradford's conclusory opinion, untrustworthy, not a factual finding by the government, and therefore, hearsay inadmissible under the Minn. R. Evid. 803(8)(C) (1979) exception to the hearsay rule. The jury understood, however, that Bradford's letter was not a formal governmental finding binding on Goodyear, and we cannot say the trial court abused its discre-

tion in admitting the letter. *Cf. In re Multi-Piece Rims Prods. Liab. Litig. M.D.L. No. 362*, 545 F.Supp. 149 (W.D. Mo. 1982) (Bradford letter ruled admissible, under Fed. R. Evid. 803(8), with proper cautionary instructions). We have also reviewed Goodyear's claims of error with respect to admission of OSHA regulations, expert testimony, and the Hodder video tape demonstration of a K-rim explosion, and we find these rulings were within the proper exercise of the trial court's discretion.

IV.

Goodyear challenges the $12.5 million punitive damages award. For there to be punitive damages the defendant must have acted with "willful indifference to the * * * safety of others" and this conduct must be established by clear and convincing evidence. Minn. Stat. § 549.20 (1986); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn. 1980). Because of the open-ended and volatile nature of punitive damages, this court exercises "close control over the imposition and assessment of punitive damages." *Lewis v. Equitable Life Assurance Co.*, 389 N.W.2d 876, 892 (Minn. 1986) (quoting another source). We conclude punitive damages are proper but in a lesser amount.

In *Gryc* we upheld a $1 million punitive damages award against the manufacturer of a highly flammable cotton flannelette, where the manufacturer, even though flame-retardant cotton was available, persisted in marketing its flammable product because it was more profitable. In *Gryc*, then, the willful indifference consisted of continued marketing of a defectively manufactured product. In this case we do not have a defectively manufactured product nor do we have a defectively designed product; rather, the manufacturer's fault here consisted of negligent failure to warn. The question, then, is whether Goodyear's conduct in failing to warn rose to the level of willful indifference.

This is not a case where the manufacturer gave no warnings. Goodyear did warn, and its warning message,

insofar as content, was generally adequate. For example, Goodyear's safety film showed a K-rim tire exploding into a dummy figure with every bit as much devastating vividness as Hodder's own video trial demonstration. Goodyear's posters, manuals, and mass mailings told of the dangers and safety measures to be taken. The problem was that these materials received inadequate distribution. Over a 10-year period, for example, it appears Goodyear's sales representative visited only 26 towns in all of northern Minnesota with literature on K-rim dangers. In large part, too, Goodyear left the initiative to tire shops to write in for safety material in response to its ad in trade journals.

So the issue becomes whether Goodyear's inadequate distribution of K-rim warnings was willfully indifferent. By 1962, Goodyear had discontinued production of the KWX and by 1969 it had discontinued production of all K-rims. Goodyear withheld some accident reports and told the Department of Transportation that production had been discontinued for commercial reasons, whereas the jury could have found it was because of growing concern over explosions. In 1972, Goodyear's chairman expressed concern about protecting the tire and tube market which was dependent on multi-piece rims, and K-rims in stock continued to be sold. In 1973, the Smith study reported K-rims were inherently dangerous. Not until 1974-75 did Goodyear undertake a warning program, but then budgeted only about $100,000 a year for this purpose, after company objections "to us[ing] advertising dollars for projects which are not advertising or product promotion." In 1976-77, Goodyear offered a Rim Safety Exchange Program, offering to take in used K-rims on purchase of a new L-rim at a discount, but the discount was unrealistically small; only four K-rims were turned in nationwide and the program was abandoned. In 1979, Goodyear balked at the government's re-

quest for a voluntary recall and instead pushed for OSHA regulations.[7] Not until 1983 did Goodyear have the OSHA regulations in its catalog. While Goodyear itself described the K-rims as dangerous if not used properly, it explained its less-than-efficient distribution of warnings by saying you cannot reach everybody. While Goodyear warned that tire assemblies explode with disastrous effect—a fact not unknown and common to all rims—Goodyear's warnings usually neglected to single out the special hazards of the K-rim. We conclude there was evidence from which the jury could find that Goodyear deliberately downplayed and obscured the dangers of the K-rim to protect its tube and tire sales and thereby exhibited willful indifference to the safety of others.

Goodyear argues that punitive damages were awarded, however, not for failure to warn but for failure to recall, which it says is legally impermissible.[8] "The question," responds Hodder, "is not whether there is a cause of action at common law for failure to recall, but simply whether the failure to give consumer notification as a remedial measure is evidence of a failure to warn and of conduct giving rise to punitive damages." Hodder's point is well taken. Hodder never claimed a recall cause of action nor was any jury instruction given on recall.

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[7] Hodder argues that Goodyear's willful indifference is demonstrated by its "pressure" on OSHA to adopt safety regulations, so that the "liability onus" would be transferred to service personnel. We would think campaigning for OSHA regulations shows the opposite of indifference. Goodyear's indifference lies, rather, in assuming OSHA's program absolved it of pursuing a vigorous warning program of its own.

[8] Goodyear contends there is no common law duty to recall, citing *Smith v. Firestone Tire & Rubber Co.*, 765 F.2d 129, 135 (8th Cir. 1985), and hence recall affords no basis for awarding punitive damages; further, in any event, that a punitive damages award based on recall is preempted by the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1381 et seq. (1982). We need not reach this issue.

Nevertheless, it must be remembered that the jury found the KWX rim not to present an unreasonable risk of harm by reason of design. In other words, the jury found, as of 1955, that neither the regular K-rim, nor the L-rim, nor the single-piece rim, was safer than the KWX.[9] The jury so found even though the L-rim was in regular use in 1955. As for the single-piece rim, its acceptance for heavy load trucks came gradually in later years as development on the larger tubeless tires progressed. Yet, in arguing punitive damages, Hodder argued the K-rim design was defective because both the L-rim and the single-piece rim were safer, and that Goodyear, therefore, should have put out K-rim warnings which said, "Do Not Use This Product."

In view of the finding of a nondefective KWX-rim design, we do not think the evidence is clear and convincing that Goodyear was willfully indifferent in not telling users not to use the K-rim at all. Only to the extent that Goodyear failed to warn users how to use the K-rim was the evidence clear and convincing of willful indifference.[10] Yet Hodder's counsel (who disclaims a recall cause of action) asked the jury (at a time, of course, when the defective design issue was yet unresolved) for $12,500,000 punitive

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[9] The trial court's instruction on defective design followed JIG 117, and required the jury, among other things, to balance "the likelihood of harm and the seriousness of that harm against the feasibility and burden of any precautions which would be effective to avoid the harm," and, to consider in the final balance, among other things, "[t]he availability of other and safer products to meet the same need."

[10] The issue here is not which kind of rim was better, but whether, if one rim was better, Goodyear was willfully indifferent, not only in failing to warn about the less safe rim, but in not withdrawing it for the more safe rim. Between 1955 and 1981 there was a gradual evolution in the relative merits of the various rims involving many complex considerations. Against this background and the jury's finding that the K-rim was not defectively designed, Goodyear's election not to recall used K-rims cannot be said to be willful indifference which meets the higher clear and convincing standard of proof.

damages based on the cost of recalling 250,000 K-rims at $50 each. The jury awarded $12,500,000. The conclusion is inescapable that the jury awarded appreciable punitive damages on a theory the jury itself had rejected.

We are persuaded, therefore, that the award of punitive damages cannot stand because of obvious error in the jury's calculations. We also conclude that justice is best served by reducing the punitive damages rather than by granting a new trial. *See Stanger v. Gordon*, 244 N.W.2d 628, 632 (Minn. 1976) (reduction rather than new trial given). When, as here, the issues of liability and compensatory damages have been fairly tried and need not be tried again, we would not want to grant a new trial on all issues; and we hesitate to grant a new trial on punitive damages alone, where the evidence of fault, now established, is yet again exhaustively presented to decide only the egregiousness of that fault. Furthermore, punitive damages do not "belong" to the plaintiff in the same sense as compensatory damages. Punitive damages are to punish the defendant, not compensate the plaintiff who has already been compensated. Indeed, some argue that the public should have more of a claim to collect a punitive award than the plaintiff. In any event, it is because of the unique, public aspect of punitive damages that the court exercises a much closer supervision over these awards than is the case with compensatory awards.

In determining the reduction, we look for proportionality between the egregious misconduct and the amount of damages, keeping in mind "those factors which *justly bear* upon the *purpose* of punitive damages." Minn. Stat. § 549.20, subd. 3 (1986) (emphasis added). Here, first of all, the award must be substantially discounted for the erroneous per-rim recall calculation. Secondly, while the focus is on the dangerous propensity of the K-rim to explode, the egregious misconduct must, under the jury's findings, be restricted to the inadequacies of the warnings; the product, itself, it must be remembered, was found not defec-

tive, neither in design nor manufacture, nor was there a complete failure to warn. It appears the jury, in punishing the defendant, may have included factors not "justly bearing" on punitive damages. Finally, the purpose of punitive damages needs to be kept in mind, namely, to punish and deter the conduct found to be willfully indifferent to the safety of others. We conclude, in this case, that an appropriate punitive damages award should be $4 million. The award, therefore, is reduced from $12.5 million to $4 million.

V.

Minn. Stat. § 176.061, subd. 6 (1981), divides a plaintiff employee's tort recovery between the employee and his employer roughly as follows: After deduction of expenses of collection, one-third is paid to the employee outright; the remainder is to reimburse the employer for compensation paid; and any balance remaining thereafter goes to the employee but with a credit to the employer against future compensation payable. Hodder challenges the trial court's application of the subdivision 6 formula to his recovery of compensatory damages. The parties agree punitive damages go to the employee outside the formula.

Under subdivision 7 of the statute, the employer has "a separate additional cause of action" against the third party tortfeasor for past and future medical expenses. Here Remer Oil was awarded $1,238,916 for past and future medical expenses and the trial judge excluded this sum from the subdivision 6 formula. Hodder claims this sum should have been included. We agree.

We have previously recognized the special, independent nature of the employer's statutory cause of action for medical expenses under subdivision 7. *See Travelers Ins. Co. v. Springer*, 289 N.W.2d 131, 133 (Minn. 1979); *see also Metropolitan Transit Comm'n v. Bachman's*, 311 N.W.2d 852, 854 (Minn. 1981). Under *Springer*, we held the em-

ployer's third-party claim for medical expenses exists when the employee is unable to sue the third party because the employee cannot meet the threshold requirements of the no-fault act for a tort action.

If the subdivision 7 action could be limited to medical expenses, the direct recovery Remer Oil urges might be appropriate as a narrow exception to the general application of the subdivision 6 formula.[11] In 1983, however, the legislature expanded subdivision 7 to cover not just medical expenses but "other compensation payable." 1983 Minn. Laws ch. 290, § 35. By this amendment, the legislature meant to extend *Springer* to ensure the employer's right to recover nonmedical compensatory benefits as well as medical expenses in instances where the employee's right to recover tort damages is barred by the no-fault act. *Allstate Ins. Co. v. Eagle-Picher Industries, Inc.*, 410 N.W.2d 324, 326-27 (Minn. 1987). We recognize, of course, that the 1983 amendment does not govern Holder's case, but if the pre-1983 statute is construed to exclude medical expenses from the subdivision 6 formula, it follows that the amended statute, in other cases, must exclude other compensation payable as well as medical expenses. Employers could in the future entirely bypass the subdivision 6 allocation by suing out their "separate additional" cause of action; if the subdivision 6 formula does not apply to any of the employer's subrogation interest, the employee

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[11] The subdivision 7 medical expense action was enacted in 1953, 1953 Minn. Laws ch. 755, § 6. Apparently the legislature was then reacting to *Dockendorf v. Lakie*, 240 Minn. 441, 61 N.W.2d 752 (1953), which had allowed the compensation insurer to recover its subrogation claim for benefits and medical expenses out of plaintiff employee's general, unsegregated verdict against the third-party tortfeasor. *See also* the follow-up opinion, *Dockendorf v. Lakie*, 251 Minn. 143, 86 N.W.2d 728 (1957). Since then the third-party action has been further modified and the current subdivision 6 allocation formula added. Over the years, except for *Springer*, the nature of the subdivision 7 action has not been examined and, in practice, has been treated ambivalently.

would no longer be assured of at least recovering for himself one-third of the tort recovery after expenses. Nor would employers have to share equitably in the employee's cost of recovery. We think this result is neither desirable nor was it intended.

We hold, therefore, that when, as here, the employee's tort action includes medical expenses separately asserted by his employer, nevertheless, the employer's recovery of medical expenses is subject to the subdivision 6 formula. This result respects the allocation of employer and employee rights inherent in the statutory scheme of section 176.061. In those instances where the employee does not or cannot maintain a third-party action, subdivision 7 continues to give the employer, as in *Springer*, the right to recover its benefits paid and payable. So, in this case, the entire $3,368,916 compensatory award is subject to allocation under section 176.061, subd. 6.

After calculating Hodder's attorney fees for the compensatory award,[12] the trial judge excluded costs taxed to Goodyear ($52,372.41) and prorated the remaining collection costs to exclude costs attributable to recovery of punitive damages. Exclusion of costs taxed to Goodyear was proper as Hodder did not have to pay them. Prorating the other legal costs was, however, incorrect, as we do not believe costs expended for establishing punitive damages and those for compensatory damages can be realistically separated in this case.

Under the subdivision 6 formula, after the employee receives his one-third share of the tort recovery outright, the employer is entitled to reimbursement for compensation benefits already paid from the remaining balance. Or-

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[12] Because we hold the entire compensation award is subject to distribution under subdivision 6, Hodder's attorney fees should be calculated for formula purposes from that amount rather than from the nonmedical compensatory award as in the trial court's calculation.

dinarily, this reimbursement is reduced by an amount representing the employer's proportionate share of the costs of the tort recovery.[13] Apparently because Remer Oil hired its own attorneys to represent its subrogation interests throughout the trial, the trial court did not reduce Remer Oil's reimbursement by its proportionate share of the employee's costs. This was incorrect.

Frequently, the plaintiff-employee conducts the entire tort litigation and the employer either does not have an attorney or its attorney does little or nothing to assist in the tort recovery. In such instances, we have said it is equitable for the employer, who is being reimbursed, to share part of the employee's collection costs. *Cronen v. Wegdahl Coop. Elevator Ass'n*, 278 N.W.2d 102, 104 (Minn. 1979). The equities are less clear where, as here, the employer's own attorney presents the employer's subrogation claim. Under a former version of subdivision 6, this court refused to make an employer "pay twice for its recovery of the subrogated interest" when the attorneys had agreed in writing that the employee's attorney did not represent the employee's interest and each attorney reached a separate settlement with the third party tortfeasor during joint negotiations. *Anderson v. Twin City Lines*, 289 Minn. 11, 16, 182 N.W.2d 193, 195 (1970). This case falls somewhere between *Cronen* and *Anderson*. While Remer Oil's attorney actively participated in the trial, he was partly defending against Goodyear's claim for *Lambertson* contribution. Also, Remer Oil's subrogation recovery depended heavily on Hodder's efforts, as indicated by Hodder's trial expenses of over $173,000 to Remer Oil's expenses of about

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[13] Subdivision 6(c) calculates the amount of reduction of the employer's reimbursement for costs of recovery as follows:

$$\frac{\text{cost of collection under subd. 6(a)}}{\text{total compensatory award}} \times \text{workers' compensation benefits paid by employer} = \text{amount of reduction}$$

$12,500. Moreover, the record shows no agreement between Remer Oil and Hodder on relative litigation responsibilities or allocation of fees and costs, although it occurs to us such agreements might be useful. On these facts, we think the equities lie with the employee and there is no justification for straying from the statutory formula which is intended "to ensure that those benefited by the recovery share equitably in the cost of obtaining that recovery." *Cronen*, 278 N.W.2d at 104. Remer Oil's reimbursement should be reduced by its share of the collection costs calculated under subdivision 6(c).

There is one last subdivision 6 correction. Any balance remaining after the employer's reimbursement "shall be paid to the employee or his dependents and shall be a credit to the employer" for benefits the employer has to pay in the future. The trial court assigned the full balance as Remer Oil's credit. We have previously held, however, that this balance must also be reduced by the employer's proportionate share of collection costs calculated by the ratio used in subdivision 6(c). *Kempa v. E. W. Koons Co.*, 370 N.W.2d 414, 420 (Minn. 1985); *Kealy v. St. Paul Hous. & Redevelopment Auth.*, 303 N.W.2d 468, 475 (Minn. 1981). The trial court erred in omitting this step.

Preverdict interest on pecuniary damages "shall be computed * * * from the time of the commencement of the action * * * except as provided herein." Minn. Stat. § 549.09, subd. 1(b) (1984). One of the exceptions is the offer-counteroffer provision. Under this provision, if the winning party's settlement offer proves to be closer to the judgment than the losing party's, the winning party gets preverdict interest from the start of the lawsuit. But if the losing party's offer is closer, the losing party pays less preverdict interest.[14] Goodyear challenges the trial court's application of the offer-counteroffer provision.

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[14] Minn. Stat. § 549.09, subd. 1(b) (1984), provides in relevant part:

On November 14, 1984, Hodder wrote Goodyear, claiming his compensatory damages alone, excluding punitive damages, were over $7.5 million and making a settlement demand of $7,507,522. Goodyear asked for clarification, including whether the demand figure included Remer Oil's workers' compensation subrogation claim. On December 27, 1984, Hodder confirmed by letter that its demand included Remer Oil's claim and insisted that it had a right to so claim. On February 11, 1986, Goodyear responded by letter, pointing out that Remer Oil had not joined in Hodder's demand and offered to settle Dale Hodder's claim under a *Naig-Pierringer* release for $750,000. Hodder argues Goodyear's counteroffer was untimely, not given within 60 days of his November 14 demand. Goodyear denies untimeliness and says its offer was closer to the $3.3 million compensatory verdict. Hodder, in turn, says his demand of $7.5 million was closer to the total judgment which included punitive damages. The trial court awarded Remer Oil prejudgment interest on its medical expense recovery from the date of commencement of the lawsuit

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(b) Except as otherwise provided by contract or allowed by law, pre-verdict or pre-report interest on pecuniary damages shall be computed as provided in clause (c) from the time of the commencement of the action, except as provided herein. If either party serves a written offer of settlement, the other party may serve a written acceptance or a written counter-offer within 60 days. After that time interest on the judgment shall be calculated by the judge in the following manner. The prevailing party shall receive interest on any judgment from the time the action was commenced * * * until the time of verdict or report only if the amount of its offer is closer to the judgment than the amount of the opposing party's offer. If the amount of the losing party's offer was closer to the judgment than the prevailing party's offer, the prevailing party shall receive interest only on the amount of the settlement offer or the judgment, whichever is less, and only from the time the action was commenced * * * until the time the settlement offer was made. * * *

This law became effective July 1, 1984, with interest accruing from that date in any pending cause of action. 1984 Minn. Laws ch. 472, § 2.

and similar interest to Hodder on his nonmedical compensatory award. We affirm preverdict interest on the entire compensatory judgment but our analysis differs from that of the parties and the trial court.

Valid offers and counteroffers under section 549.09 must be in writing and must offer, in sufficiently clear and definite terms, to dispose completely the claims between the negotiating parties. The statute aims to promote settlements and this is best accomplished by offers which are straightforward and would in an effective and practical manner settle matters between the negotiating parties. Having said this, we recognize section 549.09 is ill-adapted to multi-party lawsuits,[15] particularly a plaintiff-employee's action against a third-party tortfeasor.

Here, Hodder has a personal injury claim. Remer Oil has a claim too, a special claim for workers' compensation paid and credit for compensation yet to be paid, recoverable out of the tort recovery, enforceable by a statutory right to intervene, yet subject to the subdivision 6 formula. Remer Oil also has an interest in defeating the third-party tortfeasor's counterclaim for *Lamberston* contribution which would diminish its subrogation recovery. It is evident that Remer Oil's subrogation claim cannot be a realistic candidate for settlement offers and counteroffers unless included within Hodder's settlement offer or unless Hodder has first settled his own claim separately on a *Naig* release. As a practical matter, Remer Oil's interests

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[15] *See* Note, *The Minnesota Prejudgment Interest Amendment: An Analysis of the Offer-Counteroffer Provision*, 69 Minn. L. Rev. 1401 (1985). Indeed, the note goes so far as to say it is arguable whether the offer-counteroffer provision applies to any actions involving more than two parties. *Id.* at 1425. We decline to take this route, although the legislature may perhaps wish to review the matter. Whether the offer-counteroffer device, requiring parties to take formal, fixed positions and gamble on which position will be closer to the final result, actually promotes settlements is perhaps another arguable proposition, but not one for us to answer.

are inextricably intertwined with Hodder's interests, and Hodder controls the settlement initiatives.[16] We hold, therefore, that in an employee's third-party tort action, for the purposes of the offer-counteroffer provision of the prejudgment interest statute, any offer must treat the employee and the employer as one party, and any settlement offer, to be valid, must encompass the interests of both the employee and the employer. This makes good sense. It requires, in the spirit of the statute, that settlement offers be made that will dispose of the entire claim against the third-party tortfeasor. True, the employee and employer may disagree on how to divide the settlement recovery between them, but this need not prevent them from agreeing on an aggregate settlement offer or counteroffer to present to or accept from the third party.

In this case Hodder did offer to settle both his claim and Remer Oil's claim for $7.5 million. Nevertheless, his offer was invalid because Remer OIl, apparently pursuing its own strategies, never joined in that demand. Goodyear was not required to respond to an offer where the offerors were not in agreement. Neither was Goodyear's offer of $750,000 to settle with Hodder, exclusive of Remer Oil's interest, a valid offer. While *Naig* settlements are appropriate, this piecemeal kind of settlement does not meet the requirements for a valid offer under section 549.09. For example, to what "judgment" must Goodyear's $750,000 offer be closest? And what if Hodder and Remer Oil had responded to Goodyear's $750,000 *Naig* offer with a valid offer to settle their joint interests for $7.5 million?

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[16] For example, *see Lambertson v. Cincinnati Corp.*, 312 Minn. 114, 257 N.W.2d 679 (1977), and *Naig v. Bloomington Sanitation*, 258 N.W.2d 891 (1977), and their progeny. Because of the substantial conflict of interest between the employee and the employer, counsel for the plaintiff employee cannot presume to speak for the employer's subrogation claim. *See, e.g., Easterlin v. State*, 330 N.W.2d 704 (Minn. 1983); *Quarberg v. Laundry Store Sales, Inc.*, 269 Minn. 213, 214, 130 N.W.2d 340, 342 n. 1 (1964).

The offer-counteroffer provision of section 549.09 cannot function with offers which are not responsive to each other.[17]

We hold that no valid offer or counteroffer was made by any party in this lawsuit. Consequently, Goodyear must pay preverdict interest on the entire compensatory judgment.[18] Goodyear seems to argue that if *the claimant* makes no settlement offer, there can be no preverdict interest. This is incorrect. The general rule laid down by section 549.09 is that preverdict interest is computed from the time the action is commenced *unless* the offer-counteroffer

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[17] We should not be understood as saying that there must always be a counteroffer to activate the offer-counteroffer provision of the prejudgment interest statute. If, in this case, Goodyear had served an offer on Hodder and Remer Oil to settle their aggregate interests for a specific sum, that would have been a valid offer, and, if Hodder-Remer Oil had not responded with a valid offer, Goodyear's offer would stand alone and activate the preverdict interest reduction.

The court of appeals in *Kulkay v. Allied Central Stores*, 398 N.W.2d 573, 578 (Minn. App. 1986), held that the offer-counteroffer provision applies only if both parties make valid offers. We disagree. The provision applies whenever one party serves a valid offer. If the other party fails to respond or the response is invalid, the valid offer by default is closer to the judgment. This interpretation is borne out by the statute which says, "[*i*]*f either party* serves a written offer of settlement, the other party *may* serve a written acceptance or a written counter offer within 60 days." (Emphasis added.) If the purpose of the statute is to promote settlements, this is best accomplished by penalizing the party who fails to respond to a settlement overture or who makes an invalid offer.

[18] The statute does not allow preverdict interest on punitive damages, and, quite correctly, no claim for such interest has been made by Hodder.

Minn. Stat. § 549.09 was amended by 1986 Minn. Laws ch. 455, § 81 to bar preverdict interest on "judgments for future damages." This amendment does not "clearly manifest" an intent to be applied retroactively, and we hold it does not have retroactive effect. *See* Minn. Stat. § 645.21 (1987).

exception applies. No offers having been made, the exception does not apply, and the general rule governs.

Finally, the clerk neglected to tax interest on punitive damages from the date of the verdict. This should have been done. Minn. Stat. § 549.09, subd. 1(a) (1984). On remand, the clerk should add postverdict interest on the punitive damages award as reduced.

VII.

The judgment and orders appealed from are affirmed, except the case is remanded (1) to reduce the punitive damages award to $4,000,000; (2) to recalculate the allocation of the compensatory award between the employee and the employer under Minn. Stat., § 176.061, subd. 6, in accordance with this opinion and to revise the judgment (with preverdict interest on the whole thereof) accordingly; and (3) for the clerk to add postverdict interest to the punitive damages awarded.

Affirmed in part, reversed in part, and remanded with directions.

COYNE, Justice, took no part in the consideration or decision of this case.

APPENDIX B

STATE OF MINNESOTA
IN SUPREME COURT

C3-87-419 and C2-87-511

Dale L. Hodder,
Respondent (C3-87-419,
Appellant (C2-87-511),

vs.

The Goodyear Tire & Rubber Company
et al, defendants, petitioners,
Appellants (C3-87-419)
Respondents (C2-87-511),

Pioneer Rim & Wheel Company,
Respondents,

and

The Goodyear Tire & Rubber Company,
defendant and third party plaintiff, petitioner,
Appellant (C3-87-419),
Respondent (C2-87-511),

vs.

Remer Oil Company, Inc.,
third party defendant,
Respondent,

and

Pioneer Rim & Wheel Company
defendant and third party plaintiff,
Respondent,

vs.

Acheson Tire Company, third party defendant,
Respondent,

Arrowhead Equipment Company,
third party defendant,

Respondent,

Itasca Tire Company, third party defendant,

Respondent.

ORDER

This court, having considered en banc the petitions for rehearing in the above entitled case,

IT IS HEREBY ORDERED:

1. In its petition for rehearing, Goodyear Tire & Rubber Company (as one of its arguments) calls our attention to an amendment to Minn. Stat. § 549.09, the pre-verdict interest statute, enacted by the 1988 legislature, effective April 13, 1988 "to all cases then pending." *See* 1988 Minn. Laws ch. 503, § 6. The "cases then pending" provision means that the 1988 amendment to subdivision 1, which relates only to the rate of interest, was to be effective April 13, 1988; contrary to Goodyear's contention, the "pending" language has no effect on the remainder of subdivision 1 allowing pre-verdict interest which was already in force and was left undisturbed by the 1988 amendment.

2. In all respects, the petitions for rehearing of Goodyear Tire & Rubber Company, Motor Wheel Corporation, and Remer Oil Company are denied and stay vacated.

3. No award of attorney fees pursuant to Minn. R. Civ. App. P. 140.03 is allowed.

4. The taxation of costs and disbursements by Goodyear Tire & Rubber Company and by Dale L. Hodder are hereby denied.

Dated: July 25, 1988.

BY THE COURT:

/s/ John E. Simonett
John E. Simonett
Associate Justice

COYNE, Justice, took no part in the consideration or decision of this case.

APPENDIX C

STATE OF MINNESOTA
IN SUPREME COURT

C3-87-419 and C2-87-511

Dale L. Hodder,

Respondent,

vs.

Goodyear Tire & Rubber Company,

Appellant.

ORDER

WHEREAS, Goodyear Tire & Rubber Company has announced its intention to submit to the United States Supreme Court a petition for a writ of certiorari to review that portion of the judgment awarding punitive damages; and

WHEREAS, it has moved this court to stay execution or enforcement of that portion of the judgment relating to the punitive damages award and that the supersedeas bond remain in effect during the pendency of the appellate proceedings;

IT IS HEREBY ORDERED that the motion to stay execution or enforcement of that portion of the judgment awarding punitive damages be, and the same is, granted, for the limited period of time authorized for the filing of a petition for a writ of certiorari in the United States Supreme Court. Any application for a further extension of the stay shall thereafter be directed to the United States Supreme Court for its consideration pending disposition of that petition for the writ of certiorari. This stay shall not otherwise affect proceedings now pending in the Hennepin

County District Court in accordance with this court's decision filed on May 6, 1988.

Dated: 8-10-88

BY THE COURT:

/s/ John E. Simonett
Associate Justice

AUG 10 1988
FILED

APPENDIX D

STATE OF MINNESOTA
COUNTY OF HENNEPIN
DISTRICT COURT
FOURTH JUDICIAL DISTRICT

File No. 793068 N

Dale L. Hodder,

Plaintiff,

vs.

The Goodyear Tire & Rubber Company, an Ohio corporation, and Motor Wheel Corporation, an Ohio corporation,

Defendants,

and

The Goodyear Tire & Rubber Company, an Ohio corporation, and Motor Wheel Corporation, an Ohio corporation,

Defendants and Third-Party Plaintiffs,

vs.

Remer Oil Company, Inc., a Minnesota corporation,

Third-Party Defendant.

FILED
JUL 25 1986

SPECIAL VERDICT

* * *

1. Was the KWX truck rim defective and unreasonably dangerous because of its design?

   ANSWER: YES __ No X

2. If your answer to question 1 was "yes," then answer this question:

Was such a defective and unreasonably dangerous design a direct cause of Dale Hodder's injuries?

ANSWER: YES __ No __

3. Was the Goodyear Tire & Rubber Company negligent because it knew or reasonably could have discovered the danger involved in the use of the KWX truck rim, and the KWX truck rim was not accompanied by adequate warnings?

ANSWER: YES X No __

4. If your answer to question 3 was "yes," then answer this question:

Was the Goodyear Tire & Rubber Company's negligence a direct cause of Dale Hodder's injuries?

ANSWER: YES X No __

5. Was Motor Wheel Corporation negligent because it knew or reasonably could have discovered the danger involved in the use of the KWX truck rim, and the KWX truck rim was not accompanied by adequate warnings?

ANSWER: Yes X No__

6. If your answer to question 5 was "yes," then answer this question:

Was Motor Wheel Corporation's negligence a direct cause of Dale Hodder's injuries?

ANSWER: Yes X No__

7. Was Remer Oil Company, Inc. negligent?

ANSWER: Yes X No__

8. If your answer to question 7 was "yes," then answer this question:

Was Remer Oil Company, Inc.'s negligence a direct

cause of Dale Hodder's injuries?

ANSWER: Yes X No__

9. Was Dale Hodder negligent?

ANSWER: Yes __ No X

• • •

13. Is Dale Hodder entitled to an award of punitive damages from Goodyear?

ANSWER: Yes X No__

14. If your answer to question 13 was "yes," then answer this question:

Amount of punitive damages: $12,500,000.00

15. Had the useful life of the KWX truck rim expired at the time of Dale Hodder's injuries?

ANSWER: YesX No__

16. If your answer to question 15 was "yes," then anwer this question:

Was Dale Hodder negligent for failing to determine that the useful life of the KWX truck rim had expired?

ANSWER: Yes__ No X

• • •

APPENDIX E

[13,955] Now, why is that important? It's important because they are big boys and they've got to have a big penalty or it won't make any difference to them. A couple of million dollars is nothing. It's a witness' pay. I mean it's so much money to us, but it's nothing to them. Now this—you've got to consider that.

Then the total effect. Okay, this is their only punishment, this is it. You people are it. You don't realize that yet. It's not just a conscience of this community, the whole nation is waiting to see what happens here, there's no question about it. They are waiting in the board room in Akron.

Why do you think all these people are sitting back here? Who are they that never got on the witness stand? You think this isn't important? It better be. Make it important to them.

You could punish them, sure, and you punish for past acts. Punitive damages is based on the past acts, the failure up to the time Dale Hodder got hurt to tell anybody, why didn't—

MR. HENDRICKS: Objection, Your Honor. That's improper argument on punitive damages.

[13,956] MR. RISJORD: No. it's a continuing failure to warn.

THE COURT: Sustained.

MR. RISJORD: Well, they are liable for a continuing failure to warn up to the time—

MR. HENDRICKS: Same objection, Your Honor.

MR. RISJORD: —Dale Hodder was injured.

MR. HENDRICKS: Outside the scope of the instructions and improper.

MR. RISJORD: No, it isn't; no it isn't.

THE COURT: Sustained.

MR. RISJORD: In any event, you've got to deter them, the instruction says deter Goodyear. Now, that's where you've got to consider how much.

What does deter mean? It means to stop this stuff, stop it. There's only one way you're going to stop it, and that's to make it too expensive to continue it, isn't it?

A corporation this size with this mentality of these particular people only understands that. They don't understand what you and I think of as—generally as ethics.

* * *

APPENDIX F

[13,680] THE COURT: I understand that counsel wishes to see me again on this matter, is that correct?

MR. FLASKAMP: I brought it up, Your Honor.

The original verdict form until this morning read, "Was Goodyear negligent?" and then you changed it to adopt the JIG-III instruction. The problem is that it's capable of two interpretations.

It's my understanding that the Court had ruled that if they learned later that they had a defective product or a dangerous product out in the system, that they then had a reasonable duty to warn. And Goodyear spent about three or four weeks of our time bringing on their advertising man and Pioneer Rim and Wheel and other witnesses to show that they were doing their best and utmost to warn the general public.

You can read No. 3 now because you have taken out the original negligence and gone to the JIG-III. The fact that that would be a warning that would—the obligation would terminate at the time it left their possession, which I don't think is the way that we have tired the case and the way that you have ruled on the case. So I am disturbed with the language of number 3. I know we want to get going to the jury, but we shouldn't I think blow this just for the sake of one more question.

[13,681] THE COURT: Well, Mr. Flaskamp—First of all, does anybody else have any comment about this situation?

MR. RISJORD: Your Honor, I do think that it—because what You are doing in the question is taking one sentence from the JIG instruction but not all of it, which obviously you couldn't very well, it does leave one with the impression that we are talking about a warning that had to accompany the product only, and a duty to discover the danger that would have had to precede the warning.

So we are not talking about a continuing duty to warn in the question, whereas I think the instruction is broad enough to include a continuing duty to warn.

The other problem with it is that they not only have an obligation to warn but to adequately instruct in use, safe use. There is no question but what the JIG instruction does have this sentence, which is fine, but it also goes further and elaborates more on warning than just this one sentence [13,682] about it being accompanied. So it intends to imply that there's no duty to instruct, because the question is related only to "accompanied by an adequate warning."

So for those reasons, we would join in Remer Oil's objection and assert our own further objection on the question of instruction. I think it was probably safer the way it was submitted more generally.

THE COURT; Thank you.

Mr. Hendricks.

MR. HENDRICKS: Judge, this is the safest way you can submit it. It's Minnesota law, it is JIG, and the strawhorses that the plaintiff and Remer are raising would just invite further error. I think it should conform to Minnesota law and conform to JIG, which this does.

THE COURT: Well, I think it does, and it will be given in that fashion.

* * *

APPENDIX G

STATE OF MINNESOTA
IN SUPREME COURT

C3-87-419 and C2-87-511

Dale L. Hodder,
Respondent (C3-87-419),
Appellant (C2-87-511),

vs.

The Goodyear Tire & Rubber Company et al., defendants and third party plaintiffs,
Appellants (C3-87-419),
Respondents (C2-87-511),

Pioneer Rim & Wheel Company,
Respondent,

Remer Oil Company, Inc., third party defendant,
Respondent,

and

Pioneer Rim & Wheel Company, defendant and third party plaintiff,
Respondent,

vs.

Acheson Tire Company, third party defendant,
Respondent,

Arrowhead Equipment Company, third party defendant,
Respondent,

Itasca Tire Company, third party defendant,
Respondent.

GOODYEAR'S PETITION FOR REHEARING (C3-87-419)

* * *

II. THE COURT DENIED GOODYEAR'S CONSTITUTIONAL RIGHTS TO A JURY TRIAL AND TO DUE PROCESS BY HOLDING GOODYEAR LIABLE BASED ON A THEORY NOT SUBMITTED AT TRIAL.

The Court held that "a continuing duty to warn existed and was adequately submitted." The Court overlooked that Hodder specifically did not submit on a continuing duty to warn. Hodder stated, in reference to the JIG 119 instruction and the Special Verdict Form Questions on failure to warn: "So we are *not* talking about a continuing duty to warn." T. 13,681. The parties and the trial court did not consider the issue to have been submitted. The trial court specifically cited the instruction as a point-of-sale instruction in its orders. GY original App. 88. This Court noted that JIG 119 was drafted "with time-of-sale warnings primarily in mind" and that "it does not . . . declare what the law might be on that subject" [i.e., post-sale duties]. The Court cannot assume that the jury understood an instruction contrary to the trial court's and the parties' understanding and contrary to the plain language of the instruction.

Hodder's counsel submitted only on JIG 119 because JIG 119's "inapposite" language erroneously directed a verdict for him if the jury simply followed the instructions, which this Court must assume it did.[3] Hodder's counsel elected not to submit on continuing duty to warn as a matter of strategy perhaps because he learned for the first time at trial that Goodyear had *reached Remer* with safety warnings and offers of free safety films and free safety manuals. Perhaps it was because he had no expert testimony

[3] The Court overlooked that JIG 119 must be read in conjunction with the companion special verdict question. When so read, JIG 119's "inapposite" language directed a liability finding for Hodder.

on post-sale warnings or their distribution. Or perhaps it was because Remer testified it fully instructed Hodder in safety practices (T. 2751-53, 2756, 2758-59, 2764-5, 3051), and that it would have ignored (and did ignore) any warnings or instructions sent to Remer (T. 2914-15; D. Ex. 272B and D). JIG 119, because it was not a continuing duty to warn instruction, specifically directed the jury away from post-sale warning efforts. Hodder also knew that a continuing duty to warn had not previously been recognized in Minnesota and no pattern instruction existed.

But whatever the reason for Hodder's strategy decision, the point is that Goodyear was held liable by this Court under an unsubmitted theory. The Court overlooked that it erroneously gave Hodder a no-lose situation. It permitted Hodder to drop a theory he feared losing on at trial and on appeal it "reinstated" that theory and held Goodyear liable. This denied Goodyear a jury trial on this theory. *Schreiner*, 418 N.W.2d at 210.

This Court should take this opportunity to formulate and define an appropriate instruction in a post-sale duty case. Manufacturers are not absolutely liable when instruction manuals do not reach an employee, regardless of the actual warnings going to employers and regardless of the efforts made to distribute such manuals. A post-sale duty to warn cannot be defined in JIG 119's absolute terms. Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks In The Road To A Reasonable Doctrine*, 58 N.Y.U. L. Rev. 892, 895-96 (Oct. 1983). The Court has overlooked that failure to warn is based on negligence concepts and "is to be defined in terms of reasonableness". *Germann v. F. L. Smithe Machine Co.*, 395 N.W.2d 922, 926 n.4 (Minn. 1986); *Bilotta v. Kelley Co., Inc.*, 346 N.W.2d 616, 622 (Minn. 1984); *Hauenstein v. Loctite Corp.*, 347 N.W.2d 272, 274-275 (Minn. 1984). The Court should give guidance to trail judges and litigants on an instruction appropriate in a post-sale context.

Hodder should not benefit from his trial strategy based upon the improper assumption that the jury did not precisely follow the inapposite instruction. Article I, Section 4 of the Minnesota Constitution and due process principles under the Federal and state constitutions require a new trial under a properly defined, continuing duty to warn instruction.

III. IMPOSITION OF PUNITIVE DAMAGES FOR BREACH OF A CONTINUING DUTY TO WARN CONTRADICTS THIS COURT'S HOLDING IN *LEWIS v. EQUITABLE LIFE ASSURANCE SOCIETY.*

This Court recently held that Minnesota's punitive damages statute "should not be read to extend the availability of punitive damages to newly recognized causes of action. . . ." *Lewis v. Equitable Life Assurance Society*, 389 N.W.2d 876, 891-92 (Minn. 1986). The Court reasoned that "[t]he concern of the legislature in enacting the punitive damages statute, section 549.20, was to limit the frequency and amounts of punitive damage awards." *Id.* The Court affronts its own proscription in *Lewis* when, for the first time, it recognizes a continuing duty to warn, and then imposes a $4 million punitive damages award based on the new cause of action.

Lewis mandates striking the punitive damages award. Like this Court, the *Lewis* court was presented with a question of first impression expanding a cause of action. *Compare Lewis*, 389 N.W.2d at 886 ("We have not previously been presented with the question of defamation by means of 'self-publication.' ") *with Hodder v. Goodyear Tire & Rubber Co.*, slip op. at 10 ("We have not had occasion to deal with [the question of whether a post-sale duty to warn exists] before.") And similar to this case, the *Lewis* court expanded the scope of an existing cause of action. *Compare Lewis*, 389 N.W.2d at 888 (expanded defamation action to include the concept of compelled self-publication should be "cautiously applied") *with Hodder* (expanded fail-

ure to warn action to include continuing, post-sale warnings which "arises only in special cases"). The *Lewis* court struck punitive damages.

Therefore, Goodyear's Petition for Rehearing must be granted because this Court overlooked and failed to consider the *Lewis* decision which is controlling on the punitive damages issue. *See* Minn. R. Civ. P. 140.01.

The principle embodied in *Lewis* is constitutionally demanded. Due process demands a party have clear and *prior* notice of the standard of conduct for which it may be subject to punishment. Here, Goodyear is being punished under standards of conduct that (1) did not exist in 1981, and (2) were not even submitted to the jury. The Court must reconcile this case with *Lewis* and strike the punitive damages award.

IV. IMPOSITION OF PUNITIVE DAMAGES REQUIRES DUE PROCESS AND OTHER CONSTITUTIONAL SAFEGUARDS THAT WERE NOT EMPLOYED IN THIS CASE.

Punitive damages are in the nature of a criminal penalty because the jury focuses on the defendant's conduct, not the plaintiff's injury. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Like criminal penalties, punitive damages have the same goals of punishment and deterrence. "They are not compensation for injury." *Id.* The trial court instructed the jury that it could assess punitive damages to *punish* Goodyear. Therefore, Goodyear should have been accorded basic procedural and other constitutional safeguards. *Bankers Life and Casualty Co. v. Crenshaw*, ___ U.S.L.W. ___ (U.S. May 16, 1988) (O'Connor, J., concurring) (Imposition of punitive damages without adequate procedural safeguards and standards raises "a due process issue that . . . is worthy of the Court's attention in an appropriate case. . . . [T]he Court should scrutinize carefully the procedures under which punitive damages are awarded in civil lawsuits . . . [W]holly standardless discre-

tion to determine the severity of punishment appears inconsistent with due process.") *See also Aetna Life Insurance Co. v. Lavoie*, 106 S. Ct. 1580, 1589 (1986); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269 (1984). The constitutional provisions implicated by the points stated in this petition are: the Sixth, Seventh, Eighth, and Fourteenth Amendments of the Federal Constitution and Article I, Sections 4, 5, 6 and 7 of the Minnesota Constitution.

V. THE COURT OVERLOOKED THAT IMPOSITION OF PUNITIVE DAMAGES BASED UPON A NEWLY-ANNOUNCED STANDARD OF LIABILITY IMPOSED RETROSPECTIVELY UPON GOODYEAR VIOLATES THE SIXTH AMENDMENT PRINCIPLE OF NOTICE AND FAIR WARNING AND DUE PROCESS PRINCIPLES OF THE UNITED STATES AND MINNESOTA CONSTITUTIONS.

This Court, *post-accident* and *post-trial*, expanded a manufacturer's duty to warn under Minnesota law to a post-sale warning distribution system. The Court's imposition of $4 million in punitive damages on a newly-recognized, unsubmitted standard of liability retroactively applied against Goodyear is abhorrent to any notion of fundamental fairness and due process of law.

A. Imposition Of Punitive Damages For 1981 Conduct Held To Violate A Post-Sale Duty To Warn First Recognized in 1988 Violates Due Process And Sixth Amendment Principles Of The Federal And Minnesota Constitutions.

The Due Process Clause of the Fourteenth Amendment, the Sixth Amendment and the parallel clauses in the Minnesota Constitution require that Goodyear have clear and *prior* notice that certain conduct is proscribed before it can be punished for that conduct.[4] Goodyear had no fair

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[4] This fundamental right is also at the heart of the prohibition against *ex post facto* laws, a principle held to be embodied in the Due Process

warning in 1981 that its warning distribution system was illegal or even inadequate. Even JIG 119, drafted after 1981, did not "declare what the law might be on [this] subject." Goodyear could not have ascertained from Minnesota law in 1981 that it had a continuing duty to warn or what the standard of conduct was in order to satisfy this duty.[5] Essentially, Goodyear has been "convicted" and fined $4 million for violating a "law" that did not exist at the time of the accident. Certainly, the law was not defined by any clear standards of conduct announced by Minnesota courts at any time prior to 1981.

A reading of Minnesota precedent pre-1981 compels the conclusion that the standards under which the $4 million

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Clause. *Marks v. United States*, 430 U.S. 188, 191 (1977) ("the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties—is fundamental to our concept of constitutional liberty"); *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) ("The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred', [citation omitted], must apply to bar retroactive criminal prohibitions emanating from courts as well as legislatures."); *Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 972 (2d Cir. 1985), (*Ex post facto* principles "may be applied in civil cases where the civil disabilities disguise criminal penalties").

[5] A rule of law "which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984), quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). Where, as here, an essentially criminal penalty is imposed, "the standard of certainty is higher." *Kolender v. Lawson*, 461 U.S. 352, 359 n.8 (1983).

> "The requirement that government articulate its aims with a reasonable degree of clarity ensures that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values, reduces the danger of caprice and discrimination in the administration of the laws [and] enables individuals to conform their conduct to the requirements of law . . . ." *Roberts*, 468 U.S. at 629.

penalty was assessed were nonexistent when Goodyear's alleged willfully indifferent conduct occurred.[6] Compounding this fundamental constitutional oversight, the continuing duty to warn theory was not even submitted to the jury in this case and, therefore, could not be the basis for the punitive damages imposed. The Court, therefore, overlooked Goodyear's constitutional rights when it retrospectively imposed in 1988 a new standard of liability for 1981 conduct. Significantly, punitive damages were imposed in "hindsight", not for concealing a danger or marketing a defective product, but for the Court's ill-advised and unsupported judgments about the adequacies of Goodyear's warning distribution efforts which admittedly did *reach* Remer.

B. Imposition of Punitive Damages Premised On An Underlying Liability Instruction That Contained "Inapposite" Language And Did Not "Declare What The Law Might Be On That Subject" Is Standardless And Unconstitutional Punishment.

Here the Court imposed punitive damages upon an underlying liability (post-sale duty) never submitted to the jury. Moreover, as this Court stated, the JIG 119 instruction upon which the jury premised liability "does not . . . declare what the law might be on that subject." The Court violated due process by imposing punitive damages where the jury received no clear instruction on the nature of the underlying duty.

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[6] In *Balder v. Haley*, 390 N.W. 855 (Minn. App. 1986), *rev'd* 399 N.W.2d 77 (Minn. 1987), the Court of Appeals recognized that the trial court (which also saw that JIG 119 was inadequate) explicitly instructed the jury on a continuing duty to warn about a defective product. The point again is that in 1981, the time of Goodyear's alleged actionable conduct, a continuing duty to warn had never existed in any form under Minnesota law.

VI. THE COURT FAILED TO CONSIDER THAT THE UNCONSTITUTIONALLY VAGUE SECTION 549.20 AND THE VAGUE, STANDARDLESS PUNITIVE DAMAGES INSTRUCTION VIOLATED GOODYEAR'S DUE PROCESS RIGHTS UNDER THE FEDERAL AND MINNESOTA CONSTITUTIONS.

The vague punitive damage instruction, based on Section 542.30, itself compounded the constitutionally impermissible imposition of punitive damages premised on a newly-recognized duty and on an inapposite liability instruction. The trial court's punitive damage instruction provided:

> If you find by clear and convincing evidence that the acts of Goodyear show a willful indifference to the rights or safety *of others*, then you may, in addition to the other damages to which you find the plaintiff entitled, award the plaintiff an amount which will serve to punish and deter Goodyear *and deter others* from the commission of like acts. (Emphasis added).

Conspicuously absent from the instruction is any reference to Goodyear's acts *toward Hodder*. Likewise, absent from Minnesota's punitive damage statute, section 549.20, is the requirement that the punishable conduct be tied to the conduct causing injury. Incredibly, the instruction and the statute permit the jury to assess punitive damages against Goodyear for its alleged willful indifference to the safety of *anyone* at any other time, *even if it believed that Goodyear acted utterly without any willful indifference to the rights and safety of Hodder in 1981*. Such a preposterous result speaks contrary to every conceivable notion of justice and fairness embedded in our system of laws. Such a standardless instruction patently violated Goodyear's due process rights.

The instruction did not focus the jury's attention on Goodyear's conduct toward Hodder.[7] It did just the op-

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[7] The trial court's vague punitive damage instruction failed to link

posite. An award of punitive damages on that basis is the same as convicting one for crimes other than the one with which he is charged, a clear violation of due process of law. *See Gertz*, 418 U.S. at 350. *See also International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50 (1979).

The constitutional infirmities in the instruction are amplified when considered in light of the Court's "finding" that Goodyear was willfully indifferent in its warnings distribution efforts. Significantly, the irrebuttable evidence was that, through Goodyear's distribution efforts, warning literature and information reached Hodder's employer—a small service station in Remer, Minnesota, population 149. Thus, under the Court's reasoning, Goodyear is liable for punitive damages because its warning distribution efforts were "inadequate," even though they were adequate to reach Hodder's employer who, admittedly, disregarded them because he felt that he knew of the dangers of multipiece rims, T. 9430, 2914-15, 8886-99. Thus, the standardless punitive damages instruction violated due process because it allowed this Court to impose punitive damages for conduct other than conduct that caused Hodder's injuries. The jury's errant assessment of $12.5 million for not recalling a non-defective 26-year-old distorted product in use beyond its useful life demonstrated the constitutional infirmities of the standardless and vague punitive damage statute and instruction.

VII. THE COURT'S IMPOSITION OF $4 MILLION IN PUNITIVE DAMAGES DEPRIVED GOODYEAR OF ITS RIGHTS TO TRIAL BY JURY AND DUE PROCESS.

Article 1, Sections 4, 6, and 7 of the Minnesota Constitution and the Sixth, Seventh, and Fourteenth Amend-

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the acts for which the jury could punish Goodyear to those "which directly caused actual injury or damage to the plaintiff." Alsop & Herr, *Punitive Damages In Minnesota Products Liability Cases: A Judicial Perspective*, 11 Wm. Mitchell L. Rev. 319, 346 (1985) (Appendix A: Punitive Damage Charge).

ments to the Federal Constitution each guarantee the right to trial by jury and due process. Goodyear's right to a jury trial and due process were violated when the Court imposed $4,000,000 in punitive damages on a theory other than that which the jury erroneously imposed punitive damages. Thus, the award of punitive damages must be stricken or a new trial must be ordered.

Although the Court properly recognized that "punitive damages cannot stand", it nonetheless improvidently awarded punitive damages and declined to grant a new trial. The Court, assuming a function that a jury must perform, attempted to independently evaluate the record.

This Court characterizes its assessment of $4,000,000 in punitive damages as a reduction. The jury's error, however, went to *liability* for punitive damages: "It appears that the jury, in punishing the defendant, may have included factors not justly bearing on punitive damages." Further, the Court noted that "punitive damages cannot stand." Goodyear, therefore, respectfully and most vigorously disagrees with this Court's characterization. What the Court did was not a reduction, but an independent assessment. Hodder's counsel sought precisely $12,500,000 in punitive damages on a theory this Court has now determined to be inconsistent with the jury's liability finding of no defective design.[8] The jury awarded $12,500,000 in punitive damages. It, therefore, cannot be credibly main-

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[8] The hallmark of Hodder's punitive damage theory was recall. This subject occupied *days* of evidence (e.g., Hutchinson's depositions) and was the crux of Hodder's closing argument for punitive damages. T. 13,950-58. Failure to recall was the act that Hodder tried and argued as being willful. The issue Goodyear raised on appeal was that a failure to recall was, as a matter of law, an improper theory to support punitive damages. This error went to the *basis* of the punitive award. The Court improperly re-examined the record to support its independent assessment of punitive damages in violation of Goodyear's right to jury trial guaranteed by the Sixth and Fourteenth Amendments and the Minnesota Constitution.

tained that the jury awarded even $1 based on Goodyear's alleged willful indifference in distributing warning literature especially since JIG 119 "does not . . . declare what the law might be" on postsale warning duties.

In *Shu-Tao Lin v. McDonnell Douglas Corp.*, 742 F.2d 45, 47 (2d Cir. 1984), the trial court reduced a $7 million verdict to $4 million based on its calculation of what a properly functioning jury would have awarded. *Id.* a 48. The Second Circuit held it was improper "for the district judge . . . to make his own calculation of the plaintiff's damages." *Id.* at 49.

> [Where] prejudicial error has infected the jury's entire consideration of plaintiff's pecuniary loss . . . it is impossible to preserve a portion of the jury's verdict . . . by starting with the jury's verdict and cutting it down. Instead, one must proceed to calculate damages from zero and build up. While this distinction may seem purely semantic, it is not since building a damage award for pecuniary loss from zero disregards the jury's verdict entirely and *deprives defendants of their right to trial by jury.* We must, therefore, remand for a new trial. *Id.* at 50 (emphasis added).

The instant case fits squarely within the *Shu-tao* holding. *Shu-Tao* teaches that it deprives defendant a jury trial for a court to independently impose its own punitive damages award—precisely what this Court did here.

VIII. THE COURT DENIED GOODYEAR A JURY TRIAL ON WHETHER THERE IS CLEAR AND CONVINCING EVIDENCE THAT ITS DISTRIBUTION OF WARNINGS SHOWED WILLFUL INDIFFERENCE.

The Court identified the punitive damage issue to be "whether Goodyear's *inadequate distribution* of K-rim warnings was willfully indifferent" after finding that "Goodyear did warn, and its warning message, insofar as content, was generally adequate." The evidence must be

clear and convincing. Minn. Stat. Ann. § 549.20 (1986). The question obviously calls for a factual finding and the Federal and Minnesota constitutions guarantee Goodyear that a jury, not an appellate court reviewing a cold record, be allowed to make or not make that finding after being correctly and clearly instructed on the underlying duty upon which punitive damages are premised.

A. The Court Misstated And Omitted Facts In Its Evaluation Of The Record.

The Court's imposition of punitive damages based upon its misreading of the record illustrates the dangers when the right to jury trial is abridged and the Court fails to acknowledge that it "is not empowered to make . . . findings of fact. . . ." *Lumpkin v. North Central Airlines, Inc.*, 209 N.W.2d 397, 401 (Minn. 1973). Numerous misstatements occur throughout the opinion. The Court asserts, for example, that Goodyear withheld accident reports from DOT and that it mispresented the reason for discontinuing K-rims. This never occurred. There is not one shred of evidence in the record, let alone clear and convincing evidence, to support this statement. Goodyear is at a loss as to what evidence the Court is referring when it makes this unsupported, conclusory "finding of fact".

Significantly, this identical, specious allegation by Hodder's counsel was designated a specific "Common Issue" and thus subject to three years of intense litigation in the consolidated, multidistrict federal proceeding "MDL 362." Judge William R. Collinson in MDL 362 studied and analyzed hundreds of pages of record and hundreds of documents bearing on Hodder's counsel's allegation that Goodyear withheld accidents and misrepresented matters to the DOT. After an exhaustive review, Judge Collinson found *as a matter of law* that there was *no evidence* "to support the allegations that Goodyear withheld any information from NHTSA" and struck the "Common Issue" allegation.

Goodyear is shocked that this Court would "decide", on appeal, without reviewing one percent of the DOT records, without reviewing the long history of Goodyear's correspondence and work with the DOT, and without reviewing the relevant testimony that the baseless withholding allegation is "evidence" supporting punitive damages. An absolutely baseless allegation became a "finding of fact" on appeal, which this Court was not empowered to make, that will be unjustly cited against Goodyear in subsequent cases. *See Lumpkin*, 209 N.W.2d at 401. Incredibly, this Court cites the same conclusory allegations and unsupportable distortions that a federal court found baseless as "clear and convincing evidence." This Motion for Rehearing should be sustained and the opinion withdrawn to allow Goodyear to demonstrate to the Court that its conclusory "finding" was erroneous and a misreading of the record.

The Court's implication that Goodyear undertook no warning efforts until 1974-75 and then budgeted $100,000 per year for that purpose is erroneous. Not one piece of evidence of Goodyear's expenditures was introduced at trial. The figure the court picked up was for Motor Wheel alone. Motor Wheel spent $100,000 to $150,000 on its mass mailing programs alone each year in the 1970s; however, total Motor Wheel expenditures on warning efforts were much higher. Also, Goodyear itself has warned about the dangers in servicing all truck rims since the 1930s and greatly expanded its warning efforts after several safety studies of the early 1970s. All truck rim manufacturers (Firestone, Budd, Goodyear, Motor Wheel and others), the DOT, and trade associations, such as the RMA and NWRA, *funded* by the manufacturers such as Goodyear, greatly expanded their warning efforts in the 1970s because of a genuine concern for safety.

Finally, the Court overlooked that Goodyear had its own expenditures for warning distribution. One example is that Goodyear paid for the production and distribution of its safety film. D. Exs. 234 and 272E (p. 180). Hodder did

not introduce any expert testimony on warnings or necessary expenditures for their distribution. No testimony exists that Goodyear's or Motor Wheels' warning distribution program was inadequate. No evidence exists that Goodyear had any knowledge that its system was inadequate.

B. The Court's Basis For Punitive Damages Is Inconsistent With Its Holding.

The Court states that "Goodyear balked at the government's request for a voluntary recall and instead pushed for OSHA regulations" as support for its assessment of punitive damages. Later in the opinion, the Court states (footnote 10), "Goodyear's election not to recall used K-rims cannot be said to be willful indifference . . ." Goodyear's response to Bradford's recall letter had to take the form it did because the K-rim is not defectively designed, as the jury found and as the government also found at the end of IR-215 (the only NHTSA investigation of the K-rim). The jury's finding supports Goodyear's position. Yet, the Court illogically cites this, at one point, as "clear and convincing evidence" of willful conduct. Also, the Court itself held that punitive damages based on a failure to recall theory "cannot stand", but it inconsistently implies that Goodyear's valid, good faith response to Bradford's informal and erroneously premised recall request supports a punitive damages award.

The Court claims that Goodyear was willfully indifferent because it did not set out the OSHA standard in its catalogs until 1983. The Court has overlooked that, through the RMA, Goodyear had immediately published and massively distributed a hard cover safety manual setting out the OSHA standard. D. Ex. 42 (a few illustrative pages of the exhibit are attached). The trial court excluded this evidence because it contained the OSHA standard and, amazingly, the Court now finds punishable conduct for not quickly distributing the OSHA standard although D. Ex.

42 would have proved the opposite. Goodyear also led government committees designing DOT posters citing the OSHA standard. DOT, Firestone, OSHA, and others distributed these posters, and Goodyear, at its own expense, conducted massive mailings of these DOT posters. Because Goodyear and others used a safety manual and posters to publicize the OSHA standard does not show willful indifference.

IX. THE COURT IMPOSED AN UNCONSTITUTIONAL EXCESSIVE FINE FOR CONDUCT WHICH WAS BLAMELESS, OR NEGLIGENT AT BEST.

The Eighth Amendment of the Federal Constitution and Art. I, Section 5 of the Minnesota Constitution prohibit the imposition of excessive fines. The Court's imposition of a $4 million punitive damages award was unconstitutionally excessive because Goodyear's allegedly indifferent conduct bespeaks only of negligence at best.

The punitive damages issue as framed by the Court—"whether Goodyear's inadequate distribution of K-rim warnings was willfully indifferent"—was not supported by facts in the record. Of the "facts" which the Court apparently found to support the punitive damages award, only three can be logically connected to Goodyear's warnings distribution: 1) "Goodyear's sales representative visited only 26 towns in all of northern Minnesota with literature on K-rim dangers," 2) Goodyear assumed "OSHA's program absolved it of pursuing a vigorous program of its own,"[9], and 3) "in large part, Goodyear left the initiative to tire shops to write in for safety material in response to its ads." Further examination of those "facts"

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[9] Incongruously, the Court concludes that Goodyear's "warning message, insofar as content, was generally adequate," but later appears to find some fault with the warnings' content. The content of the warning message cannot be deemed to show willful indifference to the safety of others because the Court found it to be "generally adequate."

magnifies the groundlessness and, therefore, excessiveness of the Court's punitive damages award.

The "Goodyear sales representative" referred to in the Court's opinion was not Goodyear's representative but that of the defendant Pioneer Rim and Wheel. Using the actions of another party's salesmen, over which Goodyear had no control, to show willful indifference violates Minn. Stat. § 549.20(2). Punitive damages cannot be based on the acts of other parties. Moreover, Pioneer's salesmen did leave safety instructional materials in nearby towns and tire service shops, and the fact that the salesmen omitted to stop at Remer (a town of 149) indicates, at best, negligence.

As the Court recognizes, Goodyear's efforts to pass OSHA regulations governing multipiece rim servicing "shows the opposite of indifference." Yet, it incongruously finds Goodyear indifferent because it assumed that OSHA's program absolved it of pursuing a vigorous warning program of its own. Contrary to the Court's "finding", Goodyear did pursue a vigorous warning program of its own. In any event, Goodyear, in good faith, believed, as did the DOT and the experts giving public testimony to support a regulatory standard, that OSHA regulation of workplace safety was the effective way to reduce rim servicing accidents. Indeed, Goodyear's warning efforts did reach Remer, and the OSHA Standard directly and immediately led to a wholly remarkable and greatly successful reduction in rim accidents. App. 15.

Finally, the statement that "in large part" Goodyear relied on safety ads to reach tire shops with its warnings is erroneous. Goodyear, as well as other manufacturers, mailed massive amounts of warning literature to tire shops, vocational schools and other sites where rims were known to be serviced; distributed safety films; caused its trade organizations to produce manuals and distribute them; and supported the DOT and OSHA in mailing warning mate-

rials Goodyear helped design. Goodyear justifiably assumed that vocational schools, insurance companies and responsible employers, who teach tire/rim servicing safety, would use and follow the safety materials and equipment that DOT, Goodyear, Firestone and others make readily available and OSHA required.

Safety ads were intended to reach, and did reach, places like Remer that are not tire shops and may be inadvertently missed. Tire shops are and have been flooded with warning and safety materials from many sources including Goodyear. Remer, however, was a gas station which never had commercial contact of any nature with manufacturers like Goodyear. After consulting with experts in the field of warning distribution, Goodyear reasonably concluded that advertising in trade journals to which employers like Remer would likely subscribe or read was the best way to facilitate widespread distribution of its warning literature to even those places, like Remer, that may otherwise be missed. Goodyear certainly is not willfully indifferent because it put safety ads in trade journals as one part of its multi-faceted warning program.

Even assuming Goodyear's judgment could be construed, in retrospect, to be erroneous (although it cannot), it hardly bespeaks "maliciousness [or] an intentional or willful failure to inform or act" necessary for the imposition of punitive damages. *Wikert v. Northern Sand and Gravel, Inc.*, 402 N.W.2d 170, 183 (Minn. App. 1987); *American Cyanamid Co. v. Roy,* 498 So. 2d 859, 862 (Fla. 1986).

Where a defendant's conduct is nothing more than negligent, it is "an inappropriate occasion for awarding punitive damages under any formula." *International Brotherhood of Electrical Workers v. Foust,* 442 U.S. 42, 53 (1979) (Blackmun, J., concurring). Thus, this fine was imposed in violation of the Eighth Amendment and Art. I. § 5 of the Minnesota Constitution.

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APPENDIX H

STATE OF MINNESOTA — DISTRICT COURT
COUNTY OF HENNEPIN — FOURTH JUDICIAL DISTRICT

No. 793068—7PI

Dale L. Hodder,

Plaintiff,

vs.

The Goodyear Tire & Rubber, Company, an Ohio corporation, Motor Wheel Corporation, an Ohio corporation,

Defendants.

and

The Goodyear Tire & Rubber Company, an Ohio corporation, and The Motor Wheel Corporation, an Ohio corporation,

Defendants and Third-Party Plaintiffs,

vs.

Remer Oil Company, Inc.,

Third-Party Defendant.

GOODYEAR AND MOTOR WHEEL'S BRIEF IN SUPPORT OF THEIR MOTION TO AMEND THE COURT'S FINDINGS, FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

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Punitive damages are in the nature of a criminal penalty because the jury focuses on the defendant's conduct, not the plaintiff's injury. *Marston v. Minneapolis Clinic of Psychiatry and Neurology, Ltd.*, 329 N.W.2d 306, 312 (Minn.

1982). Indeed, the Court instructed the jury that it could assess punitive damages to *punish* Goodyear. *Accord Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn.), *cert. denied sub nom., Riegel Textile Corp. v. Gryc*, 449 U.S. 921 (1980). Therefore, Goodyear should have been accorded basic procedural safeguards. Ghiradi & Kucher, *Punitive Damages L. and Prac.* § 3.03 (1984).[13]

However, the Court's punitive damage instruction effectively stripped away Goodyear's right to due process that it should have regained under Minnesota constitutional and statutory law. The instruction simply did not focus the jury's attention on Goodyear's conduct toward the plaintiff, Dale Hodder. Rather, it gave the jury free rein to punish Goodyear for alleged willful and wanton conduct toward anyone who worked on truck rims between the 1950's and the present even though such conduct could not possibly have been related to and could not possibly have caused plaintiff's injury. An award of punitive damages on that basis is akin to convicting an individual for crimes other than the one with which he is charged, a clear violation of due process of law. The Court's instruction directing the jury to award punitive damages if it found that "Goodyear show[ed] a willful indifference to the rights and safety *of others*" violated Goodyear's right of due process of law guaranteed by the United States and Minnesota constitutions.

By giving a punitive damage instruction permitting punishment for conduct relating to others, the Court violated the basic principles of Minnesota law, cited above, that there is no separate cause of action for punitive damages

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[13] The clear and convincing standard, which changed the common law preponderance of the evidence standard, imposed by the Minnesota legislative was an obvious recognition of the criminal nature of punitive damages and an attempt to provide part of the necessary procedural safeguard to products liability defendants. Minnesota-Iowa Television v. Watonwan T.V. Improvement Assn., 294 N.W.2d 297, 310-11 (Minn. 1980).

and that the award of punitive damages must be premised only on the same conduct giving rise to underlying liability. *Jacobs*, 377 N.W.2d at 445; *Miexner*, 3 N.W.2d at 757.

Furthermore, the Court denied Goodyear's right of due process when it admitted evidence and arguments, without any factual basis, spanning two and one half decades of alleged misconduct which was completely unrelated to the failure to warn issue, to Goodyear's conduct toward plaintiff, or to the cause of plaintiff's injuries.

* * *

APPENDIX I

STATE OF MINNESOTA
IN SUPREME COURT

C3-87-419 and C2-87-511

Dale L. Hodder,
Respondent (C3-87-419),
Appellant (C2-87-511),

vs.

The Goodyear Tire & Rubber Company et al., defendants and third party plaintiffs,
Appellants (C3-87-419),
Respondents (C2-87-511),

Pioneer Rim & Wheel Company,
Respondent,

Remer Oil Company, Inc., third party defendant,
Respondent,

and

Pioneer Rim & Wheel Company, defendant and third party plaintiff,
Respondent,

vs.

Acheson Tire Company, third party defendant,
Respondent,
Arrowhead Equipment Company, third party defendant,
Respondent,
Itasca Tire Company, third party defendant,
Respondent.

APPELLANTS' BRIEF, ADDENDUM AND APPENDIX
(C3-87-419)

* * *

D. THE TRIAL COURT'S IMPOSITION OF A PUNITIVE FINE VIOLATED GOODYEAR'S RIGHT TO DUE PROCESS.

Imposition of punitive damages in the absence of sufficient standards also implicates due process concerns "which in an appropriate setting must be resolved. . . ." *Aetna Life Insurance Co. v. Lavoie*, 106 S. Ct. 1580, 1589 (1986) (Burger, C.J.). *See generally* Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269 (1983). Fundamental fairness allows punishment only for conduct contrary to well-defined standards. Because Hodder did not request a recall instruction and no supposed recall standards were tied to the punitive damage instruction, the jury was allowed to punish Goodyear for undefined conduct.[24]

Due process requires that Goodyear have notice that certain conduct is proscribed before it can be punished for that conduct.[25] Section 549.20 should not be used to extend punitive damages to newly recognized causes of action.

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[24] Because it was not tied to any defined elements, the vague punitive damages instruction allowed punishment for conduct towards "others" and allowed the jury to consider injuries in 134 other accident claims (Part VI.A., *infra*) as a basis of punishment. *See Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 48 (Alaska 1979), *cert. denied*, 454 U.S. 894 (1981), *overruled on other grounds, Dura Corp. v. Harned*, 703 P.2d 396, 405 n.5 (Alaska 1985) (error to permit punishment "for all wrongs committed against all purchasers and users of its products, rather than for the wrong done to this particular plaintiff"). The trial court permitted the jury to speculate on the complex subject of recall without having any guidelines and without tieing those guidelines to Hodder's claim. Goodyear could properly only be punished for invading Hodder's rights, not for invading the undefined rights of "others." *Unified School District No. 490 v. Celotex Corp.*, 629 P.2d 196, 213 (Kan. App. 1981) (Rees, J. concurring).

[25] The corollary to the notice requirement of the Due Process Clause in the fourteenth amendment is the prohibition against *ex post facto* laws in Art. I, § 10: "No state shall . . . pass any . . . *ex post facto* law. . . ."

Lewis, 389 N.W.2d at 89-92; *see* Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 Ky. L.J. 1, 57 (1985-86) ("although manufacturers and others can determine after the fact that certain types of conduct will result in punishment, the requirement that they be given a clear idea of proscribed conduct *in advance* is not satisfied"). Goodyear had no notice of a legal duty to recall a non-defective product being used beyond its useful life. Punitive damages were the impermissible "loose cannon on the legal deck," *Jacobs*, 377 N.W.2d at 445, and violated Goodyear's due process rights. They must be stricken.

* * *

APPENDIX J

PUNITIVE DAMAGES

If you find by clear and convincing evidence that the acts of Goodyear show a willful indifference to the rights or safety of others, then you may, in addition to the other damages to which you find the plaintiff entitled, award the plaintiff an amount which will serve to punish and deter Goodyear and deter others from the commission of like acts.

Clear and convincing evidence means that the evidence must lead you to conclude that it is highly probable that Goodyear acted with willful indifference to the rights or safety of others. Put another way, the evidence must produce in your minds a firm belief or conviction that Goodyear acted in willful indifference to the rights or safety of others.

Willful indifference means that Goodyear acted in deliberate disregard to the rights or safety of others.

If you determine that punitive damages should be awarded, you should consider factors relating to the purpose of punitive damages in determining the amount, including, but not limited to, the following factors:

1. The seriousness of the hazard to the public arising from Goodyear's misconduct.
2. The profitability of the misconduct to Goodyear.
3. The duration of the hazard and of its excessiveness.
4. The attitude and conduct of Goodyear upon discovery of the misconduct.
5. The number and level of employees involved in causing or concealing the misconduct.
6. The financial condition of Goodyear.
7. The total effect of other punishment likely to be imposed upon Goodyear as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons.

You may award punitive damages against a company because of an act done by an employee only if you find that:

1. The company authorized the doing and the manner of the act; or
2. The employee was unfit and the company was reckless in employing him; or
3. The employee was employed in a managerial capacity and was acting in the scope of employment; or
4. The company or managerial employee of the company ratified and approved the act.

APPENDIX K

549.20. Punitive damages

Subdivision 1. Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others.

Subd. 2. Punitive damages can properly be awarded against a master or principal because of an act done by an agent only if:

(a) the principal authorized the doing and the manner of the act, or

(b) the agent was unfit and the principal was reckless in employing the agent, or

(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or

(d) the principal or a managerial agent of the principal ratified or approved the act.

Subd. 3. Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing he misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

Laws 1978, c. 738, § 4, eff. April 5, 1978. Amended by Laws 1986, c. 444.

Historical Note

Laws 1978, c. 738, § 11. provides that this section is effective April 15, 1978, and applies to all causes of action arising on or after that date.

88-626

No. 88-686

Supreme Court, U.S.
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE GOODYEAR TIRE & RUBBER COMPANY,
Petitioner,

vs.

DALE L. HODDER,
Respondent.

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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QUESTIONS PRESENTED

I. GOODYEAR FAILED TO ADEQUATELY RAISE AND PRESERVE ITS CONSTITUTIONAL CLAIMS IN THE COURTS BELOW AND PRUDENCE REQUIRES THE DENIAL OF ITS PETITION FOR WRIT OF CERTIORARI.

II. THIS IS NOT THE APPROPRIATE CASE FOR THIS COURT TO CONSIDER WHETHER THE AWARD OF PUNITIVE DAMAGES VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE GOODYEAR WAS NOT SUBJECTED TO UNLIMITED MONETARY PUNISHMENT.

III. THIS IS NOT THE APPROPRIATE CASE FOR THIS COURT TO CONSIDER WHETHER THE AWARD OF PUNITIVE DAMAGES VIOLATES THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

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RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

JURISDICTION

None of the federal constitutional questions now presented by Goodyear were properly pressed or passed upon below. Goodyear did not comply with state procedures requiring notice to the Attorney General nor with Rule 28.4(c), United States Supreme Court Rules.

STATEMENT OF THE CASE

On December 19, 1981, Dale Hodder, a healthy 17-year-old high school boy, was employed as a part-time attendant at a gas station, Remer Oil Company owned by Dale Zorman, in a small rural town in northern Minnesota. On that day, Hodder sustained catastrophic brain injuries while mounting a 1955 Goodyear KWX multi-piece rim on a logging truck. The rim explosively separated causing depressed skull fractures, brain damage, seizures, left side paralysis, and cognitive deficits, permanently disabling him from employment and requiring attendant care for life. *Hodder v. The Goodyear Tire & Rubber Company*, 426 N.W.2d 826, 829 (Minn. 1988), *reh'g denied* (July 25, 1988). The KWX rim in question was in serviceable condition at the time of the explosion. *Id.*

On July 7, 1982, Hodder filed his original Complaint against The Goodyear Tire & Rubber Company and later amended his Complaint to include its subsidiary, the Motor Wheel Corporation. Both complaints alleged that Goodyear was negligent in design of the KWX rim and failure to warn and instruct in its safe use, including failure to alert the motoring public as to the peculiar dangers involved in the use of the KWX rim after 1955.

(App. B, pp. A21-26; App. D, pp. A35-40). Punitive damages were alleged. As submitted, the product design defect theory required the jury to determine whether Goodyear knew or should have known of a KWX design defect in 1955. The jury found that Goodyear had no notice in 1955 of a design defect, found no negligence on Hodder's part, and apportioned causal negligence of 42.5% each to Goodyear and to Motor Wheel for their negligent failure to warn or instruct Hodder and 15% to Remer Oil, the employer, for its failure to warn or instruct Hodder. (App. Q, pp. A114-116). *Hodder*, 426 N.W.2d at 829.

Goodyear was held liable for punitive damages by clear and convincing evidence pursuant to Minn. Stat. §549.20.[1] At Goodyear's urging, the Minnesota Supreme Court remitted the punitive damages from $12,500,000.00 to $4,000,000.00.

The jury considered, and the Minnesota Supreme Court reviewed the following facts which clearly and convincingly proved Goodyear's willful misconduct, justifying an award of punitive damages. The KWX rim, also known as the KB, a design unique to Goodyear, was produced from 1954 to 1962 when production was discontinued for safety. (App. A, pp. A4-5). In 1971 Goodyear engineering proposed to drop all K-rims for safety. (App. A, p. A6). When asked in 1970 by the defects investigators at DOT why KB (KWX) rims were discontinued, Goodyear represented that "nothing really happened" and that it was a commercial decision. (App. A, pp. A1-3).

In November 1972, Goodyear's president, C. J. Pilliod, commanded an all out effort to eliminate the safety

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1. Laws 1978, c.738 §4, eff. April 5, 1978. Amended by Laws 1986, c.444.

hazards of multi-piece tube type truck rims so as to protect Goodyear's investment in tube type tire facilities. (App. A, pp. A7-8). As a result a field study was done by R. M. Smith and the "conspicuous conclusion" was that the majority of rim failures in the field related to the KB/KW/KWX series. (App. A, p. A9). Smith reported to management in 1973 that the parts are inherently dangerous both on the highway and in the shop, that when in use the dangerous condition is often masked, and that Goodyear's expert knowledge with regard to the serviceability of its rims was not being communicated to the user public. (App. A, pp. A10-13). Smith recommended recall. The reasons listed were to escape criticism from Akron, CTA (cover thy ass), reduce liability, threat of government pressure, avoid bad press, and increase sales. *Id.*

In 1977, Motor Wheel undertook to recall K-rims through a "rim safety exchange program" primarily at customer expense. It was a spectacular failure, with only four rims exchanged nationwide. (App. N, p. A104). At the same time Goodyear/Motor Wheel advertised K-rims for sale in its application catalogs.

In October 1979, the National Highway Traffic Safety Administration wrote to Goodyear requesting the recall of K-type rims citing the significantly higher number of accidents found among K-type rims that pointed toward an inherent safety defect. (App. A, pp. A14-16). Initially Goodyear agreed to recall K-rims from service and drafted a customer letter stating that Goodyear was taking this action "in the interest of motor vehicle safety and in the interest of your personal safety." (App. A, pp. A17-18). But Goodyear wanted a *quid pro quo* replacement of K-rims with the LW rims also under investigation and when the government would not "buy

the deal" Goodyear took no further action and the customer letter was never sent.

None of Goodyear/Motor Wheel's warnings reveal the number of accidents, discontinuance of production for safety or the conclusion to recall. Neither Zorman nor Hodder ever received any warning or instruction of the specific dangers of K-type rims or how to avoid those dangers.

The facts relating to Goodyear's misconduct were adopted by the Minnesota Supreme Court. *Hodder*, 426 N.W.2d at 835, 836.

REASONS FOR DENYING THE WRIT

I.

Goodyear Failed To Adequately Raise And Preserve Its Constitutional Claims In The Courts Below And Prudence Requires The Denial Of Its Petition For Writ Of Certiorari.

Goodyear acknowledges its failure to adequately raise and preserve its constitutional claims at any stage of the proceedings below prior to its Petition for Rehearing in the Minnesota Supreme Court. Goodyear attempts to excuse this failure by arguing that its first opportunity to make such claims came after the decision of the Minnesota Supreme Court on May 6, 1988. Goodyear depends entirely on the assertion that its liability for punitive damages in this case is premised on a newly created legal duty. The record proves conclusively, however, that Goodyear not only was apprised of Hodder's allegations of a continuing duty to warn from the outset and the Minnesota courts' movement in that direction, but proposed a stipulation before trial that it had a continuing

duty and actively defended itself at trial by proving its efforts to warn between 1955 and December 19, 1981. Because a continuing duty to warn theory was not new, novel or unexpected, Goodyear's failure to comply with Minnesota state procedural requirements for the preservation of constitutional challenges is an independent and adequate state ground upon which this Court should deny review.

A. Goodyear Was Properly Held Liable For Punitive Damages On A Theory Of Which It Had Knowledge And Upon Which It Defended The Case Long Before The Decision Of The Minnesota Supreme Court.

Contrary to its argument that the decision of the Minnesota Supreme Court was a complete surprise, Goodyear knew from the outset of this litigation that Hodder alleged liability for both actual and punitive damages based on Goodyear's post-sale failure to warn. Hodder's original Complaint filed July 7, 1982, alleges Goodyear's specific knowledge about the dangers of K-type rims after 1955 and specific acts of failure to warn between the date of sale and the date of injury. (App. B, p. A20). The original Complaint also makes a claim against Goodyear for punitive damages arising in part from Goodyear's post-sale failure to warn. Goodyear's Answer to Hodder's original Complaint raises no constitutional challenge to Hodder's claim for punitive damages. (App. C, p. A30).

On August 10, 1984, Hodder filed his Motion to Amend the Complaint, seeking to add Goodyear's wholly owned rim manufacturing subsidiary, the Motor Wheel Corporation, as a Defendant. The Amended Complaint alleges a post-manufacture warning duty of both defen-

dants. (App. D, p. A34). As Goodyear stated in its Memorandum in Opposition to Plaintiff's Motion to Amend the Complaint, the Motor Wheel Corporation did not design, manufacture, sell or distribute the KWX rim in question or any KWX rims. (App. E, p. A42). Instead, Hodder based his allegations of liability against the Motor Wheel Corporation on the fact that Goodyear delegated its continuing warning and instructional efforts on rims, including KWX rims, to Motor Wheel. Thus, Motor Wheel's liability was premised on its post-sale duty to warn, a duty which the jury found Motor Wheel breached. (App. Q, p. A115). After the trial court allowed Hodder to amend his Complaint, neither the Answer of Goodyear nor Motor Wheel contained any claim that punitive damages are unconstitutional for any reason.[2] (App. G, p. A52; App. H, p. A57). Goodyear raised in pretrial motions *in limine* the question of inadmissibility of its activities concerning recall and warning labels. The trial court held even before trial that the evidence was probative of Goodyear's continuing duty to warn. (App. I, pp. A62-63).

In addition to Hodder's allegations of a post-sale duty to warn, the evolution of Minnesota products liability law

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2. Goodyear, as it did in the Minnesota Supreme Court, takes half of a statement made by Hodder's counsel out of context to represent to this Court that Hodder conceded that he was not raising the continuing duty to warn issue. In its *Petition for Writ of Certiorari*, p.5, n.1, Goodyear claims that, "Respondent, Hodder, specifically stated that 'we are not talking about a continuing duty to warn,' Transcript 13,681, App.F. 42a." What Hodder's counsel actually said was, "So we are not talking about a continuing duty to warn in the question, (to the jury), *whereas I think the instruction is broad enough to include a continuing duty to warn.*" Transcript 13,681, 42a [emphasis supplied]. During the same instruction conference Goodyear counsel admitted that Hodder "has been arguing throughout this case that there is a continuing duty to warn . . .". Transcript 12,873 (App. L, pp. A88, A90).

foretold the Minnesota Supreme Court's finding of such a duty in this case. In Plaintiff's Trial Brief, submitted before trial commenced in March 1986, Hodder specifically contended that Minnesota products liability law gave rise to a continuing duty to warn and instruct. (App. J, pp. A64, A69-71). As early as 1977, the Minnesota Supreme Court in *Frey v. Montgomery Ward & Company, Inc.*, 258 N.W.2d 782, 786 (Minn. 1977), recognized the duty of a manufacturer to provide warnings of dangers which might arise from the use of a product if the manufacturer knows or should realize that the product is likely to be dangerous to an inexperienced user. Certainly when a product such as a truck rim is intended to be used for many years, in this case sold before Hodder was even born, the manufacturer could foresee from the *Frey* decision a duty to warn inexperienced users who may handle the product after the original date of sale. In *Gryc v. Dayton-Hudson Corporation,* 297 N.W.2d 727 (Minn. 1980), *cert. denied,* 449 U.S. 921 (1980), the Minnesota Supreme Court upheld the jury's verdict in the plaintiff's favor based in part on the defendant's failure to warn. In its decision, the court reviewed a memorandum relating to the defendant's motivation for not warning which post-dated the sale of the product in question. *Id.* at 740. In *Hauenstein v. Loctite Corporation,* 347 N.W.2d 272, 275 (Minn. 1984), the Minnesota Supreme Court refused to limit the scope of the duty to warn, holding that, "an interpretation that limits the duty to warn in products defects cases is contrary to our case law." As embodied in the Minnesota Jury Instruction Guide, JIG III, 119, the Minnesota courts' recognition that a manufacturer has a duty to keep apprised of all scientific developments in its field of expertise is also consistent with a post-sale duty to warn. *Willmar Poultry Company v. Carus Chemical*

Company, 378 N.W.2d 830 (Minn. App. 1985), *review denied* (Feb. 1986). Based on the duty of the manufacturer to keep abreast of scientific developments, other courts have held that a manufacturer who may not have actual or constructive knowledge of a danger at the time of distribution but which subsequently acquires such knowledge is obligated to take reasonable steps to notify purchasers and consumers of the newly discovered danger. *See Worsham v. A. H. Robins Company*, 734 F.2d 676, 684 (11th Cir. 1984); *Schenebeck v. Sterling Drug, Inc.*, 423 F.2d 919, 922 (8th Cir. 1970); *Comstock v. General Motors Corp.*, 358 Mich. 163, 99 N.W.2d 627 (1959); *Feldman v. Lederle Laboratories*, 97 N.J. 429, 479 A.2d 374, 386, 388 (1984); Schwartz, *The Post-Sale Duty To Warn: Two Unfortunate Forks In The Road To A Reasonable Doctrine*, 58 N.Y.U.L. Rev. 892 (1983). Finally, the Minnesota Court of Appeals in *Balder v. Haley*, 390 N.W.2d 855 (Minn. App. 1986), *rev'd on other grounds*, 399 N.W.2d 77 (Minn. 1987), in a decision rendered contemporaneously with the *Hodder* trial, specifically recognized a continuing duty to warn in Minnesota product cases, thus apprising Goodyear at the trial court level of the direction the appellate courts would take.

Because the Minnesota Supreme Court's adoption of a post-sale duty to warn represented a consistent evolution of Minnesota products liability law, this case is distinguishable from the cases relied upon by Goodyear. In *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), and *Brinkerhoff-Faris Trust & Savings Company v. Hill*, 281 U.S. 673 (1930), this Court noted probable jurisdiction where the federal claims had not been raised in the lower state courts because the state supreme courts unexpectedly overruled long lines of previous cases holding to the contrary. The litigants in *Pruneyard* and *Brinker-*

hoff-Faris had no way of anticipating the state supreme courts' reversals before their cases were decided. In *Saunders v. Shaw*, 244 U.S. 317 (1917), the Louisiana Supreme Court broke new legal ground that was unanticipated by the litigants because there was little if any indication in prior case law that such a decision could be forthcoming. Similarly, in *Vigil v. Arzola*, 102 N.M. 682, 699 P.2d 613, 621-22 (N.M. App. 1983), *rev'd in part on other grounds*, 687 P.2d 1038 (1984), the court refused to impose punitive damages on a newly recognized cause of action for retaliatory discharge because of the defendant's "reliance on the long-standing terminable-at-will rule . . .". The same distinction applies to *Phipps v. Clark Oil & Refining Corp.*, 408 N.W.2d 569 (Minn. 1987). In *Hodder*, there is no reversal of a previous decision. The decision merely adopts the theory upon which the parties tried the case, a theory foretold in previous appellate decisions in the state.

The most telling proof of Goodyear's acknowledgment of a post-sale duty to warn is the fact that it devoted much of its defense to its post-sale efforts to warn. Goodyear's trial strategy was to claim Hodder and his employer, Remer Oil Company, were liable for negligently failing to heed warnings disseminated by Goodyear and Motor Wheel contemporaneous with Hodder's employment in 1981.[3] In pursuit of this strategy, Goodyear knew that the jury's consideration of warning efforts could not be limited to the time period before 1955, especially since Hodder was not born until 1964 and Remer Oil was not even in business. Consequently, Goodyear offered the following pre-trial stipulation:

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3. Goodyear benefitted substantially from this claim through the jury's assessment of 15 percent fault against Remer Oil.

As to the issue of notice, Goodyear has stipulated in other cases and is willing to offer a stipulation in this case which will remove the need for Hodder to prove that Goodyear had notice of potential danger which created a duty to warn. For the purposes of Hodder's "failure to warn" allegations only, Goodyear offers the following stipulation:

> By at least the mid-1970's, Goodyear had sufficient knowledge of the potential for pressurized separation of multi-piece rim assemblies so as to create a duty on Goodyear's part to make reasonable efforts to warn of that potential danger.

Goodyear is willing to concede that its duty to warn arose prior to the accident involved in this [Hodder's] case. (App. F, pp. A50-51).

Consistent with this strategy, Goodyear counsel argued to the trial court that evidence of its post-sale warning efforts was admissible. (App. L, pp. A88-90). Goodyear apprised the jury in opening statement of Goodyear/Motor Wheel's post-1955 warning efforts, focusing on a study performed by Robert M. Smith, a Motor Wheel field engineer, in 1972-73, that resulted in changes in Goodyear's multi-piece rim warning efforts. (App. K, pp. A76-87). Goodyear also emphasized its involvement in pursuing the adoption of a standard by the Occupational Safety & Health Administration (OSHA) from 1976 through 1980 relating to the servicing of multi-piece rims. (App. P, pp. A112-113). Goodyear devoted much of its defense to evidence of safety films, posters, manuals, OSHA lobbying efforts and advertising occurring after 1955. Two of Goodyear's key witnesses, Philip Rosenberger and Donald White, were called specifically to tes-

tify about Goodyear's post-1955 warning efforts. Rosenberger, the man responsible for Motor Wheel's multi-piece rim warning efforts through the 1970's, devoted six days of testimony to proving Motor Wheel's efforts on behalf of Goodyear to warn and instruct about the K-rim between 1964 and 1981. Goodyear's Petition ignores Rosenberger's admission of its continuing duty to warn when he testified,

> We have an obligation to put into our catalogs, we have an obligation to tell people how to use those rims and how to mount and demount those rims, because once we have sold the rim to a distributor or on an International truck or something else and it runs 150,000 miles or five years or ten years, *we have an obligation to continue to tell them how to use it.* (App. N, pp. A92, A104) [emphasis supplied].

Rosenberger's testimony, as well as that of Donald White, is replete with references to a post-sale obligation and efforts to warn. (App. N, pp. A92-106; App. O, pp. A107-111). Undertaking such a continuing duty to warn is, itself, sufficient to justify imposition of liability for breaching the duty. *Hodder*, 426 N.W.2d at 833; *see* Steenson, *Products Liability Law in Minnesota: Design Defect and Failure to Warn Claims*, 14 Wm. Mitchell L. Rev. 443, 478 (1988).

Arguing both in Goodyear's defense of Hodder's allegations and in support of its claims of contributory negligence on the part of Hodder and his employer, Goodyear counsel referred again to these post-1955 warning efforts in closing argument. (App. P, pp. A112-113). So adamant was Goodyear in proving post-1955 warning efforts, it argued on appeal that,

> . . . the trial Court's instruction [on failure to warn] made irrelevant all the evidence it introduced of its

> subsequent warning efforts made through safety films, posters, manuals, and advertising.

Hodder, 426 N.W.2d at 833. The inconsistency in Goodyear's current position was not lost on the Minnesota Supreme Court when, in holding that Goodyear had a continuing duty to warn, the court concluded,

> Further, Goodyear has continued over the years in the tire rim business, and, although all K-rim production was discontinued by 1969, Goodyear continued to advertise its K-rims as late as 1977, and has continued to sell tires and tubes for use with used K-rims. Finally, Goodyear undertook a duty to warn of K-rim dangers. Under these circumstances, it seems to us that Goodyear had a continuing duty to instruct and to warn, so that users of used K-rims would be apprised of safety hazards which, at an earlier time, were not fully appreciated. A continuing duty to warn arises only in special cases. We think this is such a case.

Id. at 833.

One reason why this is a special case for imposing a continuing duty to warn is noted by the Minnesota Supreme Court:

> Evidence of 134 post-1955 K-rim explosion accidents was offered by Hodder. This evidence was relevant on notice to Goodyear of the K-rim's dangerous propensities and the warnings needed.

Id. at 834. Goodyear has recently admitted that since Dale Hodder's 1981 injury K-rims have caused 25 additional accidents. (App. T, pp. A127, A152). Realistically, it was

no surprise to Goodyear that a state court confronted with these grim facts would hold the manufacturer to a duty to do something to stop the slaughter.

Goodyear's argument that it raised its constitutional claims at its first opportunity to do so is contrary to the steady evolution of Minnesota law, its voluntary undertaking of such a duty, and the record of its own actions, stipulations and admissions in this case.

B. Goodyear's Constitutional Claims Raised For The First Time On Petition For Rehearing Were Untimely.

This Court has long been reluctant to exercise jurisdiction over federal questions not properly raised and ruled upon in state courts below. Whether the "not pressed or passed upon below" rule is a jurisdictional bar to review or merely a prudential restriction, this Court has identified several important policies militating against review in such cases. As Justice Marshall said six months ago,

> Our review of appellant's claim now would short-circuit a number of less intrusive, and possibly more apropriate, resolutions: the Mississippi State Legislature might choose to enact legislation addressing punitive damage awards for bad-faith refusal to pay insurance claims;[3] failing that, the Mississippi state courts may choose to resolve the issue by relying on the state constitution or on some other adequate and independent non-federal ground; and failing that, the Mississippi Supreme Court will have its opportunity to decide the question of federal law in the first instance, while any ultimate review of the question that we might undertake will gain the benefit of a well-developed record and a reasoned opinion

> on the merits. We think it unwise to foreclose these possibilities, and therefore decline to address appellant's challenges to the size of the punitive damage award.

Bankers Life & Casualty Company v. Crenshaw, 108 S. Ct. 1645, 1651 (1988); *see Illinois v. Gates*, 462 U.S. 213, 218-22 (1983), *reh'g denied*, 463 U.S. 1237 (1983). Recognizing the competence of state courts to adjudicate federal constitutional claims, the Court has held that state courts must have the first opportunity to rule upon federal challenges to state actions. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969); *see Hill v. California*, 401 U.S. 797, 805 (1971). The proper method of raising a federal question in the state court depends upon each state's practice as long as the litigant has a reasonable opportunity to have the issue heard and resolved. *See Michel v. Louisana*, 350 U.S. 91, 93 (1955), *reh'g denied*, 350 U.S. 955 (1956); *Parker v. Illinois*, 333 U.S. 571, 574-75 (1948), *reh'g denied*, 334 U.S. 813 (1948), *petition denied*, 335 U.S. 856 (1948); *Pennsylvania R. Co. v. Illinois Brick Company*, 297 U.S. 447, 462-63 (1936); *Central Union Telephone Company v. Edwardsville*, 269 U.S. 190, 194-95 (1925). This Court has consistently held that, "the failure to comply with a state procedural rule may constitute an independent and adequate state ground barring our review of a federal question . . . [where] . . . the procedural rule is 'strictly or regularly followed'." *Hathorn v. Lovorn*, 457 U.S. 255, 262, 263 (1982), *reh'g denied*, 458 U.S. 1131 (1982) (citations omitted).

Minnesota Rule of Appellate Procedure 140.01 specifically limits the issues that may be presented to the Minnesota Supreme Court in a Petition for Rehearing to any controlling statute, decision or principle of law, or any material fact, or any material question in the case which the Supreme

Court has overlooked, failed to consider, misapplied or misconceived. This rule embodies over a century of Minnesota case law precluding consideration of any issue raised for the first time in a Petition for Rehearing. The rule governing the grant of rehearings was first established by the Minnesota Supreme Court in *Derby v. Gallup*, 5 Minn. 119 (1860), and later codified as Rule 140.01. During the 120 year existence of this rule, the Minnesota Supreme Court has consistently held that arguments raised for the first time in a Petition for Rehearing will not be considered or passed upon. *Lentz v. Pearson*, 246 Minn. 145, 74 N.W.2d 662, 669-70 (1956); *First National Bank of West Minneapolis v. Persall*, 110 Minn. 333, 125 N.W. 675 (1910); *see also State v. Adams*, 251 Minn. 521, 89 N.W.2d 661 (1958), *cert. denied*, 358 U.S. 826 (1958). In *Lentz*, the Minnesota Supreme Court denied a Petition for Rehearing stating: "[T]he point specified and relied upon in the Petition for Reargument appeared for the first time in said Petition. This case was not tried below or argued in this Court on that theory. The matter, therefore, is not properly before us." 74 N.W.2d at 669-70. Only if a question decisive of the case and duly submitted has been overlooked by the Court will there be grounds for a rehearing. *See Wurdemann v. Hjelm*, 260 Minn. 455, 110 N.W.2d 150, 151 (1961).

Goodyear admits that it did not raise its constitutional claims at any time prior to its Petition for Rehearing in the Minnesota Supreme Court, although it had every opportunity to do so. Unlike the Mississippi Court in *Hathorn v. Lovorn*, the Minnesota Supreme Court has regularly followed the rule denying consideration of issues raised for the first time on Petition for Rehearing. The *Hathorn* Court recognized that where such a rule is regularly applied, "[q]uestions first presented to the

highest State court on a Petition for Rehearing come too late for consideration here." 457 U.S. at 265 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945)).

C. Goodyear's Failure To Plead Its Constitutional Claims As Affirmative Defenses Is An Independent And Adequate State Ground For Denial Of Its Petition.

The Minnesota courts have held that the unconstitutionality or illegality of a statute is an affirmative defense which must be raised in a responsive pleading pursuant to Minn. R. Civ. P. 8.03. Failure to plead an affirmative defense constitutes waiver of the defense. *Nodland v. Chirpich*, 307 Minn. 360, 240 N.W.2d 513, 517 (1976); *Rehberger v. Project Plumbing Company, Inc.*, 295 Minn. 577, 205 N.W.2d 126, 127 (1973). The Minnesota rule corresponds to similar federal requirements. *Kewanee Oil & Gas Company v. Mosshamer*, 58 F.2d 711 (10th Cir. 1932); Fed. R. Civ. P. 8(c). Neither Goodyear's original Answer nor its Answer to Hodder's Amended Complaint raise an affirmative defense that Minn. Stat. §549.20 or its application is unconstitutional. (App. C, p. A30; App. G, p. A52).

D. Goodyear's Failure To Give The Requisite Notice To The Minnesota Attorney General At The Trial Level And At The Appellate Level And Its Failure To Comply With The Requirements of Rule 28.4(c), United States Supreme Court Rules, Are Independent And Adequate State Grounds For Denial Of Its Petition.

Goodyear failed to comply with the rules of this Court and the Minnesota courts requiring notification of the

State Attorney General when it is claimed that a state statute is unconstitutional. Goodyear's constitutional claims as to Minn. Stat. §549.20 are vague. The ambiguity may result from Goodyear's realization that it has failed to preserve any attacks on the constitutionality of a state statute pursuant to the rules of this Court and the Minnesota courts. Nevertheless, Goodyear's constitutional claims must, at the very least, be taken as an implicit attack on §549.20 and the standards upon which it allows the award of punitive damages.[4]

Minnesota Rule of Civil Procedure 24.04 provides,

> When the constitutionality of an act of the legislature is drawn in question in any action to which the state or an officer, agency or employee of the state is not a party, the party asserting the unconstitutionality of the act shall notify the Attorney General thereof within such time as to afford him an opportunity to intervene.

Historically, the Minnesota Supreme Court has been very reluctant to consider the constitutionality of any state statute when proper notice has not been given to the Attorney General pursuant to Rule 24.04. *Elwell v. County of Hennepin*, 301 Minn. 63, 221 N.W.2d 538, 545 (1974).[5] In *Elwell*, Hennepin County failed to give the

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4. Goodyear briefly addresses §549.20 in the context of its due process argument in footnote 5 of its *Petition for Writ of Certiorari* at 19.

5. *See Hughes v. Patrick and Associates*, 300 Minn. 387, 220 N.W.2d 347, 348 (1974) ("We dismiss the appeal for what we hold to be a failure to fully comply with the rules requiring notice to the attorney general in actions attacking the constitutionality of a statute . . . ."); *Johnson v. Village of Plymouth*, 288 Minn. 300, 180 N.W.2d 184, 185 (1970) ("We do not reach the constitutional issues which were neither submitted to the trial court nor brought to the attention of the Attorney General

(Continued on following page)

Attorney General notice of its claim that Minnesota's green acre statute was unconstitutional. Although the *Elwell* court ultimately agreed to consider the constitutional question, it did so because the issue had been specifically raised during the district court proceedings, the court noting that "the statute was argued by the parties in briefs submitted after the trial and was discussed at length in the trial Court's Memorandum." *Id.* at 542, 545. Therefore, the question, having been specifically considered by the trial court, was within the scope of the Minnesota Supreme Court's review. *Id.* The *Elwell* court noted, however, that the "clear intent of the rule is to provide notice to the Attorney General of an attack upon the constitutionality of a legislative act so that he may have the opportunity to defend its constitutionality." *Id.* at 544. *See Qualle v. County of Beltrami*, 420 N.W.2d 256, 258 (Minn. App. 1988); *In Re: Leary's Appeal*, 272 Minn. 34, 136 N.W.2d 552, 560 (1965). Goodyear did not give notice in 1982 or thereafter of any constitutional claims as required by Rule 24.04 (App. R. pp.

Footnote continued—

under rule 24.04, Rules of Civil Procedure."); *Campbell v. Glenwood Hills Hospitals, Inc.*, 273 Minn. 525, 142 N.W.2d 255, 260-61 (1966) (Minnesota Supreme Court refused to consider the constitutionality of statute because no notice had been given to attorney general pursuant to Minn. R. Civ. P. 24.04.); *In Re: Leary's Appeal*, 272 Minn. 34, 136 N.W.2d 552, 560 (1965) ("It was incumbent upon the appellant in this case if she wished to raise the constitutionality of the statute, to serve the required notice upon the attorney general."); *Lowe v. Patterson*, 265 Minn. 42, 120 N.W.2d 313, 316 (1963) ("The rules themselves require that all assignments challenging the constitutionality of statutes must be called to the attention of the Attorney General. Without such notice they may not be reviewed."); *Qualle v. County of Beltrami*, 420 N.W.2d 256, 258 (Minn. App. 1988) ("Appellant has not raised the issue in a timely manner. In addition, the attorney general should have been notified in writing prior to conclusion of the trial in order to allow the opportunity for the state to defend the statute's constitutionality.").

A120-121) and failed to specifically articulate its current constitutional claims in the trial court.

The Minnesota Rules of Appellate Procedure also require notice to the Attorney General. Rule 144, Minn. R. App. P. In *McGuire v. C&L Restaurant, Inc.*, 346 N.W. 2d 605, 609 n.4 (Minn. 1984); the court held that "notice must be served upon the Attorney General pursuant to Minn. R. Civ. P. 24.04 *and* Minn. R. App. P. 144 when the constitutionality of an act of the legislature is questioned in any action to which the state is not a party." (emphasis supplied). As verified by the Affidavit of Assistant Solicitor General Richard Slowes, the only notice given by Goodyear was at the appellate level. (App. R, pp. A120-122). None of the claims Goodyear now makes are contained in its Notice. Instead, the Notice is limited only to the claims that Minn. Stat. §549.20 allows the award of punitive damages based on acts toward "others," and that the trial court applied the statute by basing punitive damages on "conduct unrelated to the underlying cause of action." *Id.*

One reason for this requirement at the trial court level is to allow the legislature to amend or otherwise correct any perceived constitutional problem with the statute. Minnesota Statute §8.08 provides in relevant part:

> The Attorney General shall report to the governor biennially on or before October 1 of each even numbered year the number, character, and result of all actions and proceedings in which he has appeared for the state, . . . with such recommendations for amendment of the laws as he may deem necessary or proper, . . .

Further, in Minnesota the Attorney General acts as an advisor to the legislature and to legislative committees as provided in Minn. Stat. §8.05 as follows:

> . . . When required by either house of the legislature he [Attorney General] shall give his written opinion upon any question of law. The Attorney General similarly shall give his written opinion upon any question of law submitted to him by a permanent or interim committee or commission of the legislature or of either house of the legislature, including but not limited to an interim committee of the legislature created by law for a county containing a city of the first class.

If Goodyear had given such notice setting forth its present constitutional claims, the legislature would have had four years to amend or correct any perceived shortcomings in the statute before submission of the punitive issue to the *Hodder* jury in July 1986. With the advice of the Attorney General, the Minnesota trial court could resolve the issue "by relying on the state constitution or some other adequate and independent non-federal ground." *Bankers Life*, 108 S. Ct. at 1651. In any event, the Minnesota Supreme Court would have "an opportunity to decide the question of federal law in the first instance" and this Court thereby "gain the benefit of a well-developed record and a reasoned opinion on the merits." *Id.*

Goodyear's Petition accuses the Minnesota courts of "apparent indifference to these important constitutional issues" and state legislatures in general of doing "almost nothing to impose meaningful control."[6] It is Goodyear's

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6. Goodyear's assertion that the Minnesota legislature has ignored constitutional concerns expressed by this Court in *Aetna Life Insurance Company v. Lavoie*, 475 U.S. 813 (1986); and *Bankers Life*, is without merit. Minn. Stat. §549.20, requiring proof of punitive conduct by clear and convincing evidence, was passed in 1978, eight years before *Aetna* and the Minnesota legislature has not been in session since the *Bankers Life* decision in May 1988.

indifference to the state procedural requirements and Goodyear's strategy to do nothing until the case was lost on appeal that deprived Minnesota of resolving any punitive damage concerns in a less intrusive and possibly more appropriate manner.

Goodyear continues in this Court to ignore the right of the State of Minnesota to defend the constitutionality of §549.20. Rule 28.4(c), United States Supreme Court Rules provides:

> In any proceeding in this Court wherein the constitutionality of any statute of a State is drawn in question, and the State or any agency, officer, or employee thereof is not a party, the initial pleading, motion, or paper in this Court shall recite that 28 U.S.C. §2403 (b) may be applicable and shall be served upon the Attorney General of the State. . . .

Goodyear's Petition for Writ of Certiorari omits any notification that 28 U.S.C. §2403(b) may be applicable to this case, and the service certificate does not list the Minnesota Attorney General as a recipient.

Compounding these procedural failures is the fact that the Minnesota Constitution has provisions under which the Minnesota Supreme Court could have reviewed Goodyear's current constitutional claims had they been properly presented. Minn. Const. art. I, §§ 4, 5, 6. The same procedural failure occurred in *Bankers Life*. 108 S. Ct. at 1650. Goodyear's failure to properly raise those claims deprived the Minnesota Supreme Court of its opportunity to address these issues on independent and adequate state grounds.

Hodder raised these procedural failures in opposition to Goodyear's Petition for Rehearing in the Minnesota

Supreme Court. (App. T, pp. A127-135). This case fits squarely within the rule frequently stated by this Court that, "when 'the highest State Court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the State Courts, unless the aggrieved party in this Court can affirmatively show to the contrary'." *Webb v. Webb*, 451 U.S. 493, 495 (1981) (quoting *Street v. New York*, 394 U.S. 576, 582 (1969) (citations omitted)); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983). Goodyear has not and cannot make such a showing in this case.

In addition to principles of comity to the states, this Court has identified "a constellation of practical considerations, chief among which is [its] own need for a properly developed record on appeal" in refusing to exercise jurisdiction over federal questions "not pressed or passed upon below." *Bankers Life*, 108 S. Ct. at 1651. "There should be no doubt from the record that a claim under . . . the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." *Webb*, 451 U.S. at 501 (emphasis in original). The record in this case proves only Goodyear's repeated failure to properly raise its constitutional claims in the Minnesota courts. As a result, the record is inadequate to satisfy this Court's long standing tests for review of state court cases involving a federal constitutional challenge to a state statute.

II.

This Is Not The Appropriate Case For This Court To Consider Whether The Award Of Punitive Damages Violates The Due Process Clause Of The Fourteenth Amendment To The United States Constitution Because Goodyear Was Not Subjected To Unlimited Monetary Punishment.

The facts of this case are even less appropriate for review than those in *Bankers Life*. Unlike *Bankers Life*, Goodyear does not claim that the punitive damage award was unjustified in light of its conduct, that the award constituted a "windfall" to Hodder, that the ratio of the award to the compensatory damages, which is nearly 1:1, is inappropriate or disproportionate to its net worth.

In addition to these factual distinctions, Minnesota, unlike Mississippi, provides detailed statutory guidance governing the jury's award of punitive damages. Minnesota Statute §549.20 sets forth standards not only defining punitive conduct, but providing factors for the jury to consider in determining the appropriate amount of punitive damages. Moreover, §549.20 requires proof of punitive conduct by a stricter standard of clear and convincing evidence.[7] Section 549.20(3) provides:

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7. The Minnesota Supreme Court in *Gryc*, 297 N.W.2d 727, 739 (Minn. 1980), *cert. denied*, 449 U.S. 921 (1980), observed that the Minnesota legislature changed the legal standard for punitive damages in 1978 from the preponderance of the evidence standard applicable in the *Gryc* trial. The imposition of a stricter standard of proof further indicates the Minnesota legislature's goal of regulating the award of punitive damages. The *Hodder* jury was instructed that clear and convincing evidence "must produce in your minds a firm belief or conviction that Goodyear acted in willful indifference to the rights or safety of others."

> Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of the hazard to the public arising from the Defendant's misconduct, the profitability of the misconduct to the Defendant, the duration of the misconduct and any concealment of it, the degree of the Defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the Defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the Defendant, and the total effect of other punishment likely to be imposed upon the Defendant as a result of the misconduct, including compensatory and punitive damage awards to the Plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the Defendant may be subject.

Goodyear had notice in 1978 of the factors under which it could be held liable for punitive damages in Minnesota.

The jury considered, and the Minnesota Supreme Court reviewed substantial evidence which, when judged under the factors set forth in §549.20, clearly and convincingly proved Goodyear's willful indifference. Goodyear argues that the §549.20 standards are "virtually meaningless," but it fails to state why or offer any specific due process criticism.

To the extent a due process concern arises over the "open-endedness" of punitive damage awards, §549.20 allows the defendant to mitigate such an award through evidence of other punishment already assessed or likely to be assessed as a result of its misconduct, which Good-

year chose not to do.[8] The Minnesota Supreme Court invoked its stricter standard of review of punitive awards by tempering the jury's discretion through remittitur, a remedy specifically urged by Goodyear. *Hodder*, 426 N.W.2d at 837. In fact, after the remittitur was granted, Goodyear declared itself the successful appellant. (App. S, p. A125).

Ten years before this Court's decision in *Bankers Life*, the Minnesota legislature took steps to insure that punitive damages are awarded only in cases where the evidence clearly and convincingly proves the defendant's willful indifference and that the amount of punitive damages is appropriate in light of the defendant's conduct. These safeguards, combined with the review and remittitur powers of the Minnesota Supreme Court, resulted in a punitive damage award that constitutes .0575 of one percent (or 1/17th of one percent) of Goodyear's $6,-953,500,000.00 assets at the time of trial and that is reasonably proportionate to the jury's compensatory award. (App. M, p. A91). Hodder contends that placing an arbitrary ceiling on the award of punitive damages, thus making them predictable as Goodyear and others seem to request, will all but eliminate the punishment and deterrent effect of punitive damages. Knowing their maximum exposure for product liability misconduct, manufacturers would simply budget that exposure into their cost of doing business. On the other hand, punitive damages which are unpredictable, but within reason, do not allow Defendants to "budget" their misconduct.

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8. Section 549.20 also allows consideration of compensatory damage awards in mitigation of punitive damages and vice versa. Significantly, the vast majority of the jury's compensatory award was comprised of economic losses with a relatively small percentage being allocated to non-economic damages such as pain and suffering. (App. Q, pp. A114, A117-118).

Minnesota has a vital state interest in protecting its citizens from product manufacturers who engage in the type of conduct in which Goodyear engaged in this case. The *Gryc* Court concluded,

> Most manufacturers, both from a desire to avoid liability and from a generalized sense of social responsibility, prudently use their resources to prevent excessively hazardous products from reaching or staying on the market. On occasion, however, manufacturers abuse their control over safety information and market defective products in flagrant disregard of the public safety. . . . A legal tool is needed that will help to expose this type of gross misconduct, punish those manufacturers guilty of such flagrant misbehavior, and deter all manufacturers from acting with similar disregard for the public welfare. The punitive damages remedy is such a tool.

297 N.W.2d at 733, 737. For this Court to review punitive damages in the context of this case would be to unnecessarily intrude upon these vital Minnesota interests which have been carefully reviewed and regulated by both the Minnesota legislature and the Minnesota Supreme Court.

Even if this Court after plenary review in another case is inclined to impose a ceiling on punitive damages either in absolute dollars, ratio to compensatory damages, or percentage of financial condition, this case will certainly fall within such limits. In evaluating all of the due process concerns expressed by Justice O'Conner in *Bankers Life*, this case represents the most reasoned approach and result of any of the punitive damages cases either presently before this Court on Petition for Writ of Certiorari or in which certiorari has been denied.

III.

This Is Not The Appropriate Case For This Court To Consider Whether The Award Of Punitive Damages Violates The Excessive Fines Clause Of The Eighth Amendment To The United States Constitution.

A. Goodyear Failed To Preserve Its Excessive Fines Claim In The Courts Below.

Although this Court in *Bankers Life* found the excessive fines question to be of "some moment and difficulty," it did so in declining to review the issue because of petitioner's failure to properly preserve its claim in the courts below. 108 S. Ct. at 1651. The Court concluded that where the question is important, the policies of comity to the states and the Court's need for a properly developed record on appeal, "apply with special force." *Id.* Goodyear cannot rely upon the Minnesota Supreme Court's decision in this case as an excuse for its failure to properly raise its excessive fine claim in the courts below. Regardless of the theory upon which the damages were based, the existence of Minn. Stat. §549.20, Hodder's punitive damage allegations, and the jury's $12,500,000.00 punitive damage award gave Goodyear ample notice and opportunity to raise an excessive fines challenge years before its Petition for Rehearing in the Minnesota Supreme Court.

B. Regardless Of Eighth Amendment Implications In Civil Punitive Damage Awards, The Amount Of Punitive Damages Assessed Against Goodyear In This Case Was Not Excessive.

Regardless of whether the Excessive Fines Clause of the Eighth Amendment applies to punitive damage awards

in civil cases, there is no evidence that the punitive damage award in this case constitutes an excessive fine. *Hodder* evidences the state court's practice of maintaining "close control over the imposition and assessment of punitive damages." 426 N.W.2d at 835.

Goodyear's final argument is that the punitive award far exceeds the maximum punishment established by the Minnesota legislature for similar conduct under Minnesota's Consumer Fraud Act, but the same legislature passed §549.20 establishing the standards for the award of punitive damages in civil cases and allowing the jury to consider other fines or punishment assessed against the defendant. Nothing in the Consumer Fraud Act precludes a civil action for compensatory and punitive damages. Goodyear's reliance on *Solem v. Helm*, 463 U.S. 277 (1983), is misplaced. The *Solem* decision stands for the proposition that punishment must be proportional to the conduct as judged by objective criteria. Those criteria, "including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions", *Id.* at 292, are strikingly similar to the factors set forth in Minn. Stat. §549.20 in determining the amount of punitive damages to award in a particular case.

CONCLUSION

The belated and vague assertions of Fourteenth Amendment due process and Eighth Amendment excessive fines violations are not properly preserved and are not applicable to the facts and law of this case. The Court should deny Goodyear's Petition for Writ of Certiorari to the Supreme Court of Minnesota.

Respectfully submitted,

JOHN C. RISJORD
RANDY W. JAMES
JOHN C. RISJORD & ASSOCIATES, P.C.
10680 Barkley, Suite 100
Overland Park, Kansas 66212
913/381-5151

and

PAUL E. GODLEWSKI
BARNA, GUZY, MERRILL, HYNES & GIANCOLA, LTD.
3989 Central Avenue, N.E.
Minneapolis, Minnesota 55421
612/778-1644

88-626

No. 88-

Supreme Court, U.S.
FILED
NOV
JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE GOODYEAR TIRE & RUBBER COMPANY,
Petitioner,

vs.

DALE L. HODDER,
Respondent.

APPENDIX TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

*Paul E. Godlewski
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Of Counsel:
Robert B. Bell
Theodore J. Boutrous, Jr.
Gibson, Dunn & Crutcher

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BEST AVAILABLE COPY

(816) 421-3030

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APPENDIX A

SELECTED GOODYEAR DOCUMENTS

CONFIDENTIAL MEMORANDUM

June 11, 1970

To: Mr. E. K. Ellsworth

cc: Mr. R. J. Derleth Mr. J. F. Hutchinson (Akron)
Mr. J. H. Golata Mr. G. L. Gerbeth (Akron)
Mr. P. W. Fair

Re: Memorandum on meeting in Washington, D. C., on June 8, 1970 - Office of Department of Transportation

At the request of Mr. Roman L. Brooks, Safety Standards Engineer in the D.O.T. Office, an informal meeting was held for the purpose of acquainting the Department of Transportation people with rim and wheel designs where loose parts are involved (i.e., truck wheels and rims).

In attendance at the meeting for Goodyear, were:

J. F. Hutchinson, Director of Product Quality & Safety
G. L. Gerbeth, Manager Product Design & Development - MPD
R. J. Burns, writer of this memorandum

Present for Department of Transportation, were:

Joe H. Clark, Jr., Chief of Defects Division
Joe O'Gorman, Chief, Division of Testing

M. Jack Lilley, Branch Chief of Division of Defects
Roman L. Brooks, Safety Standards Engineer
Jim E. Thomas, Highway Safety Management Specialist

The meeting, as stated, was quite informal but a number of very succinct questions were asked of us concerning rim design, rim tolerances, manufacturing, techniques, sources of mill sections, tolerances on mill sections, incoming inspection techniques on steel sections, rim design techniques and background, and a number of questions concerning rim and wheel assembly and usage. Typical of some of the questions asked are listed below.

* * *

Question (Clark) - Apparently something happened in '62 or '64 with your KB/KW rims that caused you to change your ideas about them and take them off the market.

Answer (Burns) - Nothing really happened - it was a commercial decision on my part as General Manager to eliminate the rim to decrease inventory and reduce setup in order to run a more competitive shop. You see, Gentlemen, the KW and KB bases are identical to the LB and LW except that the KB's and KW's have a split base and a continuous side flange, and a LB and LW are solid base rims with split side flanges.

Further, the KB and KW can be used only on cast steel wheels while the LB and LW can be used as demountable or nondemountable, or in other words, used in the manufacture of a disc wheel.

* * *

Roman Brooks then described the Huizenga accident as he understood it. Apparently, Mr. Huizenga discovered that his right front tire was soft. Learning this, he jacked up the right rear dual assembly with the idea of removing one of the assembled tires and rims for use on the right front. For reasons not known, he removed both rims from the wheel and was in the act of remounting the rim and tire on the wheel when the assembly apparently exploded.

* * *

R. J. Burns

* * *

August 17, 1971

* * *

Aetna Life & Casualty
230 West Monroe Street
Chicago, Illinois 60606

Attention: Mr. John Schroeder

RE: Insured: Goodyear Tire & Rubber Co.
Claimant: Robert Huizenga
D/A: December 19, 1967

* * *

Gentlemen:

The depositions of Robert Huizenga and Leanne Huizenga, plaintiffs in the above case, were taken for discovery purposes on August 11th. Mr. Gerhart L. Gerbeth of Goodyear Tire & Rubber Company came to Chicago for the depositions and for a conference regarding this case at my request. Mr. Gerbeth was most helpful.

* * *

Both before and after the deposition, I conferred at some length with Mr. Gerbeth. Mr. Gerbeth is a very knowledgeable man in the field of tire rims.

Mr. Gerbeth explained to me that there are essentially three types of rims for truck tires. One is a solid rim, the second is a solid rim with a split lock ring, and the third is a split rim with a solid lock ring which is the type involved in this case.

The particular rim in this case, as you know, is a lightweight type of split rim.

Mr. Gerbeth estimates that about twenty similar cases have been filed against Goodyear. None of these cases involved either the first or second type of rims, and none of them (or perhaps only one) involved the standard gauge split rim. All of these cases resulted from split rims of the lighter weight. Mr. Gerbeth conceded quite frankly that the only reason for producing the lighter weight split rim was to achieve a lower cost item for sale. He also admits quite freely that he was instrumental in inducing the company to stop producing the lightweight split rims in 1962. Events similar to the instant case had occurred and this was a significant factor in discontinuing this product.

* * *

Ordinarily, rims of this type when they become worn or distorted should be discarded. However, the difficulty that Goodyear has been faced with, as the only producer of split rims, is the problem of warning users of this problem. You are aware that the Department of Transportation has conducted a study in this regard. We did not know that Mr. Gerbeth and other Goodyear representatives had actually gone to Washington to discuss this problem with government representatives. You are aware that Goodyear complied with the Department of Transportation request for complete background material on this type of rim design.

* * *

Yours very truly,

HINSHAW,CULBERTSON,MOELMANN,
HOBAN & FULLER

* * *

August 25, 1971

COMMENTS CONCERNING:

Metal Products
Product Planning
Product Engineering Department

1. Current Products

* * *

Drop

K-KW - Safety-rim requires extra step to insure complete lock.

* * *

OFFICE MEMO

November 30, 1972

* * *

COMPONENT PRODUCT MANAGEMENT COMMITTEE MEETING MINUTES OF MEETING HELD NOVEMBER 27, 1972

* * *

Pilliod Program for Tube Type Truck Tire Longevity

The contradiction of (1) market trend to tubeless truck tires and rims/wheels and (2) Goodyear Tire interests was reviewed. Mr. Pilliod has commanded an all-out effort to eliminate the safety hazards of multi-piece tube type truck rims so as to protect the Goodyear investment in tube type tire facilities. Requirements are:

1) No possibility of inflating assembly unless all lose [sic] rim component parts are fully engaged.

2) No possibility of disengaging loose rim components without complete deflation of tire.

One Development Engineer at Metal Products has been assigned full time to this development. Mr. Derleth emphasized the urgency of this project.

* * *

A8

MOTOR WHEEL CORPORATION
OFFICE MEMO

Date December 11, 1972

MR. R. A. JAY
cc: C. J. Pilliod
J. F. Hutchinson
M. A. Wilson
P. W. Fair
M. J. Lincoln

Re MULTIPLE PIECE TRUCK RIMS

Prior to the October 20, 1972 meeting in Mr. Pilliod's office, Motor Wheel had been working towards one-piece, drop center, 15° truck rims to meet anticipated safety requirements. During the meeting Mr. Pilliod stated it was impossible for Goodyear to produce enough tubeless 15° tires to meet total truck requirements for many years. Motor Wheel was then charged with the task of designing multiple piece rims which would meet future safety requirements.

* * *

R. J. Derleth

A9

MOTOR WHEEL CORPORATION
OFFICE MEMO

Date April 6, 1973

To Mr. G. Gerbeth

cc: Messrs. P. Fair
R. M. Smith
R. Derleth
T. Martin
M. Lincoln
R. Burns

Re MULTI-PIECE TRUCK RIM/WHEEL SAFETY
REFERENCE REPORT SMITH/FAIR DATED 4/5/73

Bob Smith today presented his very comprehensive summary and analysis relating to the subject.

A conspicuous conclusion brought out in his report is that the majority of rim failures relate to the KB/KW/KWX series.

* * *

W. D. Pile

We make a vital vehicle component which is a metal product with an undefined, but limited, useful life. The parts are inherently dangerous both on the highway and in the shop. When in use the dangerous condition is often masked. We know that these parts, especially old and damaged parts, sometimes catastrophically cease to serve their intended purpose. The time at which the usefullness [sic] ceases is dependent on chance, service procedures, maintenance, proper use of tools, and the use, abuse and mis-use of which the parts have been subjected during their lifetime. When this happens, there may be a social loss and/or a property loss to the user, the involved user or to interested or disinterested bystanders and a financial loss to Goodyear.

In the eyes of the user community, the part is a secondary component. It is a sturdy, heavy part, made of steel. He, therefore, thinks it has an unlimited useful life. He does not recognize the possible dangers associated with the product. There is no significant economic reason to replace an old with a new part, other than tubeless, since there has been no improvement in the state of the art.

We have expert knowledge with regard to maintenance. Such information is published, but the information may not reach the involved user. If it does, he apparently doesn't see any reason for it. We do not follow up published information with personal contact to show how and the reason why.

We have expert knowledge with regard to serviceability (possibly negative type of knowledge). Such information is not detailed in our publications. The involved user cannot tell a "good" part from a "bad". He

doesn't believe the part won't function (provide support for the tire). He doesn't believe it will endanger him. Even if he feels it is unserviceable, he may not be able to replace it due to owner or his bosses instructions; or a replacement may not be available. He may be willing to take a chance because he can't afford a new rim, or he's in a hurry.

Solution: Improve level of knowledge of user regarding need for maintenance, maintenance procedures and how to determine serviceability. Eliminate the problem parts.

Why should a user discard old, bent, worn, corroded and cracked wheel/rim parts when they appear to continue to serve the purpose intended?

1. Safety

prevent social loss } but chance of
prevent liability loss } accident is small

Why should he properly maintain present parts? (remove rust, keep painted, proper use of tools)

1. Safety
2. Lengthen part life, but it takes time

Will a new part lengthen useful life of tire or vehicle? Reduce downtime? Lower operating costs? Enhance performance in any way? Improve appearance? (probably no to all of these)

Why do we care about resolving this matter?

1. Escape criticism from Arkon [sic]
2. CTA

3. Reduce liability
4. Threat of government pressure
5. Avoid bad press
6. For the good of society
7. Increase sales

What could we do?

1. Recall

or 2. Advisory to alert the public to danger by

DOT
Industry association
Goodyear

or 3. Sales campaign

plus 4. Education

What would happen?

1. Any positive action to get parts out of use will probably result in more liability suits and higher damage awards, but at the same time should reduce the number of accidents.
2. An intensive sales/education campaign with first hand contact would probably result in the scrapping of more parts than advisory and may be even a recall.
3. We would have to provide replacements through our distributor organization.
4. We could be subject to criticism from our customers and others in the industry.

How could we do it?

1. Solicit advice from DOT - Sproale to handle contacts 1 on 1.
2. Discussion with others in industry - staff level contacts.
3. Counsel from Goodyear - Lincoln and Dohnal with counterparts.
4. Formulate sales/education campaign - engineering define maintenance and serviceability, sales prepare distribution program (special old or obsolete part trade-in incentive; premium awards; etc?)

Recall, advisory = 1,2,3

Sales, education campaign = 1,2,3,4

(RECEIVED
NOV 23, 1979)

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration
Washington, D.C. 20590

REGISTERED MAIL

RETURN RECEIPT REQUESTED

* * *

Mr. J. F. Hutchinson
Vice President
The Goodyear Tire and Rubber Company
Akron, Ohio 44316

Dear Mr. Hutchinson:

Over the past several months the National Highway Traffic Safety Administration (NHTSA) has been conducting an engineering analysis involving the explosive disassembly of multipiece truck and bus wheels. The analysis was initiated as a result of a review of this agency's past decisions concerning such wheels, information obtained during past defect investigations, and recently acquired data.

The purpose of this analysis was to identify any rim types which warrant recall corrective action. Our analysis focused on all types of multipiece rims and included a reassessment of the disposition of former defect investigation case 215, involving Goodyear KW, KB, and KWX wheels ("K type").

* * *

After reviewing and analyzing all of this information, we found that the "K type" rims have been involved in a significantly higher number of accidents of explosive disassembly than most other types of multipiece rims (production volume considered). * * *

All types of multipiece rims can be subject to a variety of servicing procedures, including the use of worn, corroded, or mismatched parts. When recognizing this, the significantly higher number of accidents found among "K type" rims is totally unacceptable and points toward an inherent safety defect in these rims. The Goodyear internal document, dated August 25, 1971, referenced in my letter to you of March 16, 1979, and citing the extra step required ". . . to insure complete lock" when assembling these wheels, certainly indicates that safety played a role in their discontinuance. The Goodyear catalogue printed in November 1977 and entitled, Goodyear On-Highway Rim Safety & Service Manual, also cites their ". . . unique configurations that deserve special mention."

The high number of accidents found among "K type" rims is reflected in the data which Goodyear provided under this analysis. Moreover, the conclusions about the unique danger associated with these rims are well documented by others closely associated with multipiece wheels. Some of these documents can be found in the current NHTSA rulemaking docket on this subject.

In view of the foregoing, I strongly recommend that Goodyear voluntarily initiate a recall and remedy campaign to remove the remaining "K type" rims from service. Postitive action now will not only preclude further accidents, injuries, and deaths, but also obviate the delay

in and the necessity of further investigative effort and the scheduling of administrative enforcement proceedings.

Under the authority of the National Traffic and Motor Vehicle Safety Act of 1966, as amended, Goodyear is hereby requested to notify me within seven (7) working days from receipt of this letter whether it will conduct a safety recall.

* * *

Sincerely,

Lynn L. Bradford
Acting Director
Office of Defects Investigation
Enforcement

* * * 12-19-79

CUSTOMER LETTER

Subject: Goodyear's Voluntary Recall of "K" Type Multi-Piece Rims

The National Highway Traffic Safety Administration and The Goodyear Tire & Rubber Company have conducted surveys and analyses of accidents involving the separation of "K" type rims resulting in a number of deaths and injuries, specifically to persons mounting, dismounting and otherwise servicing multi-piece rim and wheel assemblies.

* * *

The NHTSA has advised Goodyear that its analysis indicates a significantly higher number of accidents among "K" type rims than other types of multi-piece rims.

* * *

In view of the in service age of the "K" type rims and the aforementioned findings of the NHTSA and The Goodyear Tire & Rubber Company, Goodyear has determined to recall all "K" type multi-piece rims from service without regard to production dates or date of purchase by the user.

* * *

If you have any "K" type rims on your vehicles or in stock, please call the closest Goodyear Truck or Farm Tire Center for replacement

* * *

We are taking this action in the interest of motor vehicle safety and in the interest of your personal safety.

* * *

Sincerely,

Vice President

J F Hutchinson

* * *

May 7, 1979

Messrs: W L Sweatt
E H Sellars
L Beckman
M C Jenison
R A Nouza
J Rumel

Subject: OSHA Rulemaking - Servicing Multi-Piece Rim Wheels

Attached to each is a copy of a proposed OSHA Standard for the servicing of multi-piece rim wheels fitted on vehicles used on and off highways.

* * *

This proposed OSHA Standard is the result of industry (wheel manufacturers) pressure on OSHA to promulgate a standard which would put the product liability onus on the people who service multi-piece rim wheels and hopefully minimize the manufacturer's exposure to product liability claims and actions arising out of multi-piece rim wheel failures and explosions resulting from improper servicing procedures.

* * *

Attorney

T D Caine

* * *

cc: S H Buzby
J F Hutchinson
Max Lincoln
Ken Betzler

APPENDIX B

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL
DISTRICT

File No. 793068

DALE L. HODDER,

and

TERRY D. HODDER and
JEANETTE R. HODDER,
Plaintiffs,

vs.

THE GOODYEAR TIRE & RUBBER COMPANY,
an Ohio Corporation,

and

PIONEER RIM & WHEEL COMPANY, a Minnesota
Corporation,
Defendants.

COMPLAINT

Comes now the Plaintiffs, and for their claim against the Defendants, state as follows:

1. Plaintiffs are individual residents of Boy River, Minnesota; Defendant Goodyear Tire & Rubber Company (hereinafter "Goodyear") is a foreign corporation with district offices located in Minneapolis, Hennepin County, Minnesota, and which has appointed the C.T. Corporation Systems, Minneapolis, Minnesota, as its registered agent for service of process, so that Defendant Goodyear

resides in Hennepin County, Minnesota; Defendant Pioneer Rim & Wheel Company is a Minnesota corporation with its offices and sales outlet located at 404 Industrial Boulevard, Minneapolis, Minnesota, so that said Defendant is a resident of Hennepin County, Minnesota.

2. On or about December 19, 1981 Plaintiff Dale L. Hodder was employed at a gas station in Remer, Minnesota and was attempting to mount a Goodyear KWX-KW split rim assembly on the axle of an International Harvester logging truck when it suddenly and unexpectedly exploded in Plaintiff's face causing severe, permanent and progressive injuries to his face, head, brain, eyes, mouth, teeth, soft tissues and other parts of his body.

3. At the time of the design, manufacture, distribution and sale of the K-type split base assembly by Goodyear the rim was defective in that it had a proclivity to blow apart and explode when put to the use intended and anticipated, which proclivity was known to Defendant and the product was defective in that Defendant failed to warn or instruct of the defects, the mounting and handling procedures and the fact that the rim was obsolete and considered dangerous by Goodyear so that it should not be used or handled and was further defective in failing to conform to specifications and contained manufacturing, processing and material defects which caused the parts to fit improperly, mismatch, wear and otherwise become unsafe.

4. At the time of Plaintiff Dale L. Hodder's injury the split K-type rim assembly was in substantially the same condition as when designed, manufactured, sold and distributed by Defendant and was used by Plaintiff in the manner in which the product was reasonably in-

tended to be used and as to which Defendant Goodyear anticipated its use, i.e., to hold and contain an inflated truck tire, and because of the aforesaid defects in the design, manufacture, material, instruction and warning concerning the K-type split rim assembly it exploded and permanently injured the Plaintiff.

5. At the time of the design, development, manufacture, distribution, licensing and sale of the subject K-type rim assembly and prior to Plaintiff's injuries, Defendant knew or reasonably should have known that the design, configuration, materials and construction of the K-type rim components presented an extreme and unusual hazard to the motoring public, to truck owners and users including anyone attempting to mount, inflate, handle, store or transport an inflated K-type rim assembly and with such knowledge Defendant Goodyear negligently, willfully, recklessly, fraudulently and intentionally disregarded the safety of the Plaintiff and the public in the following respects:

a. Ignored positive locking devices invented by Goodyear engineers in 1923 and subsequently;

b. Manufactured, distributed and sold K parts as the only domestic manufacturer of truck wheels which designed and promulgated the assembly, knowing it to be extremely hazardous;

c. Failed to recall, retrofit or warn on rim parts following the 1970-73 investigation by the Office of Defects Investigations, National Highway Traffic Safety Administration in which investigation the safety hazard of the rim was reported and documented;

d. Refused in 1971 and previously to drop the K-type rim for safety because it required an extra step to lock, according to Goodyear rim engineering;

e. Failed to warn that rims 10 years old and older are extremely hazardous and have caused numerous accidents resulting in persons being killed, blinded and maimed all over the country by the K-type assembly;

f. Attempting to exchange rims at customers' expense in a safety exchange program in which the owner of the rim was required in 1977 and 1978 to pay 90 percent of the retail price of the replacement rim while Goodyear continued to profit in the sale of the replacement rim;

g. Failed to warn of the reputation and hazards of the rim in spite of knowledge that the rim was known by experienced tire changers as "the suicide rim" and known by Goodyear product liability lawyers and insurers as "treacherous to defend" and having a "shady reputation";

h. Failing to publicize the fact that all K-type rims as of October 6, 1979 are of sufficient age as to present an extreme safety hazard while representing to the motoring public and NHTSA that rims last the life of the vehicle or longer;

i. Misrepresenting in the safety film *You May Not Get A Second Chance* that the K-type rim is an acceptable and available rim component which can be safely assembled, knowing such representations to be false;

j. Representing in Goodyear rim catalogs that the K-type rim is or may be available and is a viable and acceptable rim component for current purchase and use, and at the same time attempting through an unpublicized safety exchange program to retire K-type rims from service;

k. Suppressing the usage of proposed instruction and warning labels to be affixed to rim parts in order to avoid product liability exposure and embarrassment in the courtroom thereby protecting Goodyear corporate interests and profits at the expense of life and limb;

l. Suppressing the single-piece drop center safety rim and failing to develop and promote the sale of it in order to protect Goodyear's corporate investment in the tube-type bias truck tire manufacturing equipment and plants, thereby protecting Goodyear corporate interests and profits at the expense of life and limb;

m. Misrepresented facts concerning the K-type rim in the 1970-1973 and 1978-1981 defects investigations of the K-type rim by the Department of Transportation;

n. Failed to undertake a consumer notification campaign at the time the engineering analysis investigation of the K-type rim was opened in October, 1978 and stalling the inevitable recall of the K-type rim to obtain concessions from the Department of Transportation, National Highway Traffic Safety Administration which would:

1. Require the public to bear more than half the cost of the recall, and

2. Derive an acknowledgement from the NHTSA that the Goodyear L-type split ring was a safe substitution at a time when the L-type rim is also under investigation;

o. Establishing and utilizing a political slush fund maintained initially in a bank in Zurich, Switzerland under the code name "Goyeda" in excess of $1,000,000.00 utilized for illegal purposes including the avoidance of a government investigation, discontinuance of production and recall campaign of the K-type rim, including but not limited to $40,000.00 cash payment made to the Finance Committee to Re-elect the President of the United States, Richard Nixon, in 1972 for the purpose of influencing the safety regulations relating to multi-piece rims and aborting a spirited investigation at the NHTSA then pending while swearing falsely to the Senate Select Committee on Presidential Campaign Activities known as the Ervin Committee and to the Watergate Special Prosecution Force and the Securities and Exchange Commission that no such investigation was pending at the time of the slush fund payments.

6. At the time of the explosion which injured Plaintiff and for a long time prior thereto, Defendant Pioneer Rim & Wheel Company was the authorized truck rim distributor for the Defendant Goodyear within the State of Minnesota and undertook on behalf of Goodyear a rim safety exchange program to eliminate all K-type rims from vehicles owned or operated in the state and undertook to disseminate mounting instructions, safety literature, and warning materials to the users of K-type rims but negligently, willfully and wantonly failed to exer-

cise reasonable care to apprise the public and the users of the availability of the safety exchange for K-type rims or of the instructions, literature and materials and having accepted on behalf of Goodyear the obligation of apprising the user public within the State of Minnesota of the peculiar hazards of K-type rims, the necessity for exchange, discontinuance, recall and avoidance of use, negligently, willfully and wantonly failed to fulfill the obligation to do so as the agents of Goodyear when Defendant Pioneer Rim & Wheel Company, a Minnesota corporation, knew or reasonably should have known that their failures would result in catastrophic injuries to users of the product, including the Plaintiff.

7. As the direct result of the foregoing defects, negligence, willful, wanton, fraudulent and intentional conduct, and the promulgation of the defective product with actual knowledge of the hazards and the intentional and willful failure to instruct or warn, Plaintiff sustained the actual permanent and progressive injuries and damages as hereinabove alleged, resulting in medical and hospital treatment and custodial care causing him to incur expenses and lost earnings for life, all to his damage in the sum of TEN MILLION AND 00/100 ($10,000,000.00) DOLLARS.

8. That as a further direct result of the foregoing defects, negligence, willful, wanton, fraudulent and intentional conduct of Defendants, Plaintiffs Terry D. Hodder and Jeanette R. Hodder as parents and natural guardians of their son, Dale L. Hodder, have in the past and will in the future sustain damages and loss of out-of-pocket expenses for the increased costs of the care, custody and maintenance of their severely injured son and have sustained in the past and will sustain in the future derivative

damages in an amount in excess of ONE MILLION AND 00/100 ($1,000,000.00) DOLLARS.

9. Because of the foregoing conduct of Defendants, they should be punished and deterred from such conduct and similar future conduct by an award of punitive damages which Plaintiffs seek in the sum of THIRTY MILLION AND 00/100 ($30,000,000.00) DOLLARS.

WHEREFORE, Plaintiffs pray for judgment against the Defendants in a sum in excess of FIFTY THOUSAND AND 00/100 ($50,000.00) DOLLARS for actual, compensatory and derivative damages and a further sum well in excess of FIFTY THOUSAND AND 00/100 ($50,000.00) DOLLARS for punitive damages, together with their costs and disbursements herein expended and for such other and further relief as the Court deems just and equitable in the premises.

Niewald, Risjord & Waldeck
A Professional Corporation
2500 Commerce Tower
Kansas City, Missouri 64105-2078
(816) 842-3512

By /s/ John C. Risjord
John C. Risjord

Barna, Guzy, Merrill, Hynes
& Giancola, LTD.
Commerce Park Office Building
7362 University Avenue, N. E.
Fridley, Minnesota 55432
(612) 571-9481

By /s/ Paul E. Godlewski
Paul E. Godlewski

Attorneys for Plaintiffs

STATE OF MINNESOTA)
) ss.
COUNTY OF ANOKA)

Mark Vandelist, being duly sworn, on oath says that on the 7th day of July, 1982, he served the attached Summons and Complaint upon Pioneer Rim & Wheel Company, personally, at 404 Industrial Boulevard, Minneapolis, Minnesota 55413, in the County of Hennepin, State of Minnesota, by handing to and leaving with Steve Fisk for John Cousins a true and correct copy thereof.

/s/ Mark Vandelist
Mark Vandelist

Subscribed and sworn to before me this 7th day of July, 1982.

/s/ Cindy L. Hiller
Notary Public

(Seal)

STATE OF MINNESOTA)
) ss.
COUNTY OF ANOKA)

Mark Vandelist, being duly sworn, on oath says that on the 7th day of July, 1982, he served the attached Summons and Complaint upon Goodyear Tire and Rubber Company, by handing to and leaving with C. T. Corporation Systems, at 1032 Midland Bank Building, Minneapolis, Minnesota 55401, in the County of Hennepin, State of Minnesota, true and correct copies thereof.

/s/ Mark Vandelist
Mark Vandelist

Subscribed and sworn to before me this 7th day of July, 1982.

/s/ Cindy L. Hiller
Notary Public

(Seal)

APPENDIX C

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Court File No. 793068

DALE L. HODDER and TERRY D. HODDER and JEANETTE R. HODDER,
Plaintiffs,

vs.

THE GOODYEAR TIRE & RUBBER COMPANY, an Ohio corporation and PIONEER RIM & WHEEL COMPANY, a Minnesota corporation,
Defendants.

SEPARATE ANSWER OF THE GOODYEAR TIRE & RUBBER COMPANY

The Goodyear Tire & Rubber Company (hereinafter "Goodyear") for its Separate Answer to plaintiffs' Complaint states and alleges as follows:

FIRST DEFENSE

I.

Goodyear admits that it is a foreign corporation, that it has district offices located in Minneapolis, Minnesota, and that C T Corporation System is its registered agent for service of process in the State of Minnesota. Goodyear is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 1.

II.

Goodyear is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 2.

III.

Goodyear denies Paragraph 3.

IV.

Goodyear denies Paragraph 4.

V.

Goodyear denies Paragraph 5.

VI.

Goodyear is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 6.

VII.

Goodyear denies Paragraph 7.

VIII.

Goodyear denies Paragraph 8.

IX.

Goodyear denies Paragraph 9.

SECOND DEFENSE

X.

Goodyear alleges that plaintiffs' Complaint against it fails to state a claim upon which relief can be granted.

THIRD DEFENSE

XI.

Goodyear alleges upon information and belief that plaintiff Dale Hodder's injuries or damages, if any, were caused or contributed to by the conduct, the activities, and the manner or work being done by Dale Hodder's employer, the Remer Oil Company, or others over whom Goodyear had no control and for whose conduct Goodyear cannot be held liable, said conduct constituting an intervening superseding cause of plaintiff Dale Hodder's alleged injuries or damages.

FOURTH DEFENSE

XII.

Goodyear alleges that the injuries allegedly sustained by plaintiff Dale Hodder were sustained following the expiration of the ordinary useful life of the rim involved.

FIFTH DEFENSE

XIII.

Goodyear alleges upon information and belief that plaintiffs' claims are barred, since Remer Oil Company was a sophisticated user of wheel, rim, and tire products.

SIXTH DEFENSE

XIV.

Goodyear alleges that the "fault" of Goodyear, if any, for which it might be held liable to plaintiffs is less than the "fault," including contributory negligence, misuse, and assumption of the risk, of Dale Hodder; therefore, plaintiff may not recover against Goodyear.

SEVENTH DEFENSE

XV.

Goodyear alleges on information and belief that plaintiffs' claims, or some of them, may be barred by the applicable statutes of limitations.

WHEREFORE, The Goodyear Tire & Rubber Company demands judgment against plaintiffs dismissing the Complaint with prejudice and awarding to The Goodyear Tire & Rubber Company its costs and disbursements herein.

Dated: August 19, 1982.

Dorsey & Whitney
By /s/ James B. Vessey
James B. Vessey, P.A.
And /s/ Joel A. Flom
Joel A. Flom
2200 First Bank Place East
Minneapolis, Minnesota 55402
Telephone: (612) 340-2795/2717
Attorneys for Defendant The
Goodyear Tire & Rubber Company

APPENDIX D

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Court File No. 793068

Dale L. Hodder,
Plaintiff,

vs.

The Goodyear Tire & Rubber Company, an Ohio corporation, Motor Wheel Corporation, an Ohio corporation, and Pioneer Rim & Wheel Company, a Minnesota corporation,
Defendants,

and

The Goodyear Tire & Rubber Company, an Ohio corporation,
Third-Party Plaintiff,

vs.

Remer Oil Company, Inc.
Third-Party Defendant.

PLAINTIFF'S AMENDED COMPLAINT

Comes now the Plaintiff and for his amended claim against the Defendants, states and alleges as follows:

1. Plaintiff is an individual resident of Remer, Minnesota; Defendants Goodyear Tire & Rubber Company (hereinafter Goodyear) is a foreign corporation authorized to do business in Minnesota pursuant to the records on file with the Secretary of State, State of Minnesota, with dis-

trict offices located in Minneapolis, Hennepin County, Minnesota, and which has appointed the C T Corporation Systems, Minneapolis, Minnesota as its registered agent for service of process, so that Defendant Goodyear resides in Hennepin County, Minnesota; Defendant Motor Wheel Corporation (hereinafter Motor Wheel), a wholly-owned subsidiary of Goodyear, is an Ohio corporation with offices also located in Lansing, Michigan and conducts business in the State of Minnesota through and with Defendant Goodyear and Defendant Pioneer Rim & Wheel Company; Defendant Pioneer Rim & Wheel Company is a Minnesota corporation with its offices and sales outlet located at 401 Industrial Boulevard, Minneapolis, Minnesota so that said Defendant is a resident of Hennepin County, Minnesota.

2. On or about December 19, 1981 Plaintiff Dale L. Hodder was employed at a gas station in Remer, Minnesota and was attempting to mount a Goodyear KWX-KW split rim assembly on the axle of an International Harvester logging truck when it suddenly and unexpectedly exploded in Plaintiff's face causing severe, permanent, painful and progressive injuries to his face, head, brain, eyes, mouth, teeth, soft tissues and other parts of his body.

3. At the time of the design, manufacture, distribution and sale of the K-type split base assembly by Goodyear, the rim was of defective design in that it had a proclivity to blow apart and explode when put to the use intended and anticipated, which proclivity was known to Defendants prior to Plaintiff's injury and the product was defective in that Defendants failed to warn or instruct of the defects, the mounting and handling procedures and the fact that the rim was obsolete and considered dangerous by Goodyear and Motor Wheel so that it should not be used or handled and was further defective in failing to

conform to specifications and contained manufacturing, processing and material defects which caused the parts to fit improperly, mismatch, wear and otherwise become unsafe.

4. At the time of Plaintiff Dale L. Hodder's injury the split K-type rim assembly was in substantially the same condition as when designed, manufactured, sold and distributed by Defendant Goodyear and was used by Plaintiff in the manner in which the product was reasonably intended to be used and as to which Defendants Goodyear and Motor Wheel anticipated its use, i.e., to hold and contain an inflated truck tire, and because of the aforesaid defects in the design, manufacture, material, instruction and warning concerning the K-type split rim assembly it exploded and permanently injured the Plaintiff.

5. At the time of design, development, manufacture, distribution, licensing and sale of the subject K-type rim assembly and prior to Plaintiff's injuries, Defendants knew or reasonably should have known that the design, configuration, materials and construction of the K-type rim components presented an extreme and unusual hazard to the motoring public, to truck owners and users including anyone attempting to mount, inflate, handle, store or transport an inflated K-type rim assembly and with such knowledge Defendants Goodyear and Motor Wheel negligently, willfully, recklessly, fraudulently and intentionally disregarded the safety of the Plaintiff and the public in the following respects:

a. Ignored positive locking devices invented by Goodyear engineers in 1923 and subsequently;

b. Promoted and sold K-type parts as the only domestic manufacturer (Goodyear) and vendor (Mo-

tor Wheel) of truck wheels, knowing such assemblies to be extremely hazardous;

c. Failed to recall, retrofit or warn on rim parts following the 1970-73 investigation by the Office of Defects Investigations, National Highway Traffic Safety Administration in which investigation the safety hazard of the rim was reported and documented;

d. Refused in 1971 and previously to drop the K-type rim for safety because it required an extra step to lock, according to Goodyear and Motor Wheel rim engineering;

e. Failed to warn that rims 10 years old and older are extremely hazardous and have caused numerous accidents resulting in persons being killed, blinded and maimed all over the country by the K-type assembly;

f. Attempted to exchange rims at customers' expense in a safety exchange program in which the owner of the rim was required in 1977 and 1978 to pay 90 percent of the retail price of the replacement rim while Goodyear and Motor Wheel continued to profit in the sale of the replacement rim;

g. Failed to warn of the reputation and hazards of the rim in spite of knowledge that the rim was known by experienced tire changers as "the suicide rim" and known by Goodyear and Motor Wheel product liability lawyers and insurers as "treacherous to defend" and having a "shady reputation";

h. Failed to publicize the fact that all K-type rims as of October 6, 1979 are of sufficient age as to present an extreme safety hazard while repre-

senting to the motoring public and NHTSA that rims last the life of the vehicle or longer;

i. Misrepresenting in the safety film *You May Not Get A Second Chance* that the K-type rim is an acceptable and available rim component which can be safely assembled, knowing such representations to be false;

j. Represented in Goodyear and Motor Wheel rim catalogs that the K-type rim is or may be available and is a viable and acceptable rim component for current purchase and use, and the same time attempting through an unpublicized safety exchange program to retire K-type rims from service;

k. Suppressed the usage of proposed instruction and warning labels to be affixed to rim parts in order to avoid product liability exposure and embarrassment in the courtroom thereby protecting Goodyear and Motor Wheel corporate interests and profits at the expense of life and limb;

l. Suppressed the single-piece drop center safety rim and failing to develop and promote the sale of it in order to protect Goodyear and Motor Wheel's corporate investment in the tube-type bias truck manufacturing equipment and plants, thereby protecting Goodyear and Motor Wheel corporate interests and profits at the expense of life and limb;

m. Misrepresented facts concerning the K-type rim in the 1970-1973 and 1978-1981 defects investigations of the K-type rim by the Department of Transportation;

n. Failed to undertake a consumer notification campaign at the time the engineering analysis investigation of the K-type rim was opened in October, 1978 and stalling the inevitable recall of the K-type rim to obtain concessions from the Department of Transportation, National Highway Traffic Safety Administration which would:

(1) Require the public to bear more than half the cost of the recall, and

(2) Derive an acknowledgment from the NHTSA that the Goodyear/Motor Wheel L-type split ring was a safe substitution at a time when the L-type rim is also under investigation.

6. At the time of the explosion which injured Plaintiff and for a long time prior thereto, Defendant Pioneer Rim & Wheel Company was the authorized truck rim distributor for the Defendants Goodyear and Motor Wheel within the State of Minnesota and undertook on behalf of Goodyear and Motor Wheel a rim safety exchange program to eliminate all K-type rims from vehicles owned or operated in the state and undertook to disseminate mounting instructions, safety literature, and warning materials to the users of K-type rims but negligently, willfully and wantonly failed to exercise reasonable care to apprise the public and the users of the availability of the safety exchange for K-type rims or of the instructions, literature and materials and having accepted on behalf of Goodyear and Motor Wheel the obligation of apprising the user public within the State of Minnesota of the peculiar hazards of K-type rims, the necessity for exchange, discontinuance, recall and avoidance of use, negligently, willfully and wantonly

failed to fulfill the obligation to do so as the agents of Goodyear and Motor Wheel when Defendant Pioneer Rim & Wheel Company, a Minnesota corporation, knew or reasonably should have known that their failures would result in catastrophic injuries to users of the product, including the Plaintiff.

7. That Defendants, and each of them, breached express and implied warranties of merchantability and fitness for particular purpose to the motoring public, and specifically to foreseeable users of K-type rim assemblies including, Plaintiff Dale Hodder; that Defendants, and each of them, are strictly liable to Plaintiff.

8. As a direct result of the foregoing defects, negligence, willful, wanton, fraudulent and intentional conduct, and the promulgation of the defective product with actual and constructive knowledge of the hazards and the negligent, intentional and willful failure to instruct or warn, Plaintiff sustained severe, permanent, painful and progressive injuries and damages as hereinabove alleged, resulting in past and future medical and hospital treatment and custodial care and have caused him in the past and will cause him in the future to incur expenses and lost earnings for life, all to his damage in the sum of TEN MILLION AND 00/100 ($10,000,000.00) DOLLARS.

9. Because of the foregoing conduct of Defendants, they should be punished and deterred from such conduct and similar future conduct by an award of punitive damages which Plaintiff seeks in the sum of THIRTY MILLION AND 00/100 ($30,000,000.00) DOLLARS.

WHEREFORE, Plaintiff prays for judgment against the Defendants in a sum in excess of FIFTY THOUSAND

AND 00/100 ($50,000.00) DOLLARS for actual, compensatory and derivative damages and a further sum well in excess of FIFTY THOUSAND AND 00/100 ($50,000.00) DOLLARS for punitive damages, together with their costs and disbursements herein expended and for such other and further relief as the Court deems just and equitable in the premises.

Barna, Guzy, Merrill, Hynes
& Giancola, Ltd.
By /s/ Paul E. Godlewski
Paul E. Godlewski #35567
3989 Central Avenue, N. E.
Minneapolis, MN 55421
Telephone: 612/788-1644

and

Risjord & Curtis, P.C.
By John C. Risjord
Suite 410, Park Plaza
801 West 47th Street
Kansas City, MO 64112
Telephone: 816/531-5355
Attorneys for Plaintiff

APPENDIX E

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

File No. 793068

Dale L. Hodder and Terry D. Hodder and Jeanette R. Hodder,
Plaintiffs,

vs.

The Goodyear Tire & Rubber Company, an Ohio corporation, and Pioneer Rim & Wheel Company, a Minnesota corporation,
Defendants,

and

The Goodyear Tire & Rubber Company, an Ohio corporation,
Third-Party Plaintiff,

vs.

Remer Oil Company, Inc.,
Third-Party Defendant.

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO AMEND THE COMPLAINT

More than two years after filing the Complaint in this action, plaintiff, Dale Hodder (Hodder) now seeks to join a new party defendant, The Motor Wheel Corporation (hereinafter "Motor Wheel"). Goodyear opposes this belated attempt to add an additional party defendant.

Joinder of Motor Wheel at this late date will inject new issues, necessitate discovery, prejudice Goodyear and delay and complicate the trial of this case.[1]

A. *The Legal Standard*

Hodder moves to amend his Complaint pursuant to Rule 15.1, Minnesota Rules of Civil Procedure (MRCP). However, to the extent that Hodder is attempting to join a new party defendant through his amendment, the standards set forth in Rules 19, 20 and 21 governing joinder of parties should be applied. Rule 21 provides in pertinent part, "Parties may be dropped or added by order of the court on motion of any party . . . on such terms as are just." Rule 21 MRCP. A motion to add a party defendant is within the sound discretion of the trial court. Rule 19, 20, 21. 3 A *Moore's Federal Practice* § 21.05.

Each case must be evaluated on its own facts. The benefits to be derived from joinder are weighed by the court against the detrimental effect such joinder will have.

Factors considered by the Courts in denying joinder include:

1. Whether complete relief may be accorded among those already parties.

2. Whether joinder is based on newly discovered facts.

3. Whether new discovery will be necessary.

4. Whether the new party will be bound by prior rulings in the litigation.

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1. Hodder's amended complaint also deletes Terry and Jeanette Hodder as party plaintiffs and omits allegations contained in paragraph 5 (O) of the original complaint concerning political bribery. Goodyear has no objection to these portions of the proposed amended complaint.

5. Whether the litigation will be unduly complicated.

6. Whether joinder will delay the final resolution of the proceedings.

See generally, *Benger Laboratories Ltd. v. R.R. Laros Co.*, 24 F.R.D. 450 (E.D.Pa. 1959); *Fair Housing Development Fund Corp. v. Burke*, 55 F.R.D. 414 (E.D.N.Y. 1972); *Thompson Newspapers Inc. v. Toledo Typographical Union*, 20 F.R.D. 78 (E.D. Mich. 1974), in which the courts denied leave to join based on a combination of the above listed factors.[2]

When the above six factors are applied to the factual circumstances here, leave to join Motor Wheel should be denied.

B. *The Factual Background: Motor Wheel Did Not Design Test, Manufacture, or Distribute The Product Involved in This Case.*

Hodder does not even contend that his motion to join Motor Wheel is justified by newly discovered facts. Instead, Hodder offers the following alleged "facts" to justify joinder. (Brief in support of plaintiffs' Motion For Leave to Amend).

First, Hodder asserts that unspecified individuals who have been employed by Goodyear have also at one time been employed by Motor Wheel. This fact, even if true, is a completely inadequate ground for joinder and does not merit discussion.

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2. Hodder relies on *LaSalle Cartage v. Johnson Bros. Wholesale*, 225 N.W.2d 233 (Minn. 1975) and other cases arising under Rule 15 which deal with addition of new theories of liability or new claims against one already a defendant, but not with joinder of new parties. The circumstances confronting the court here are completely dissimilar from those in *LaSalle*.

Second, Hodder asserts that Motor Wheel was "involved" with Goodyear in all acts, errors, and omissions alleged in Hodder's case. In support of this statement, Hodder's Minnesota counsel filed an Affidavit in which he asserted that Motor Wheel was the distributor and manufacturer of Goodyear rims and wheels, that no further discovery would be necessitated by joinder of Motor Wheel, and that neither Goodyear nor Motor Wheel would be prejudiced. (Affidavit of Paul Godlewski, dated June 5, 1984). Significantly, however, Hodder does not assert that Motor Wheel was the manufacturer or distributor of the Goodyear rim allegedly involved in this action.

Hodder does contend that the rim involved in this action is a KWX rim manufactured in the 1950's by Goodyear. Hodder's Kansas City counsel is aware that Motor Wheel never manufactured, designed, sold, or distributed the KWX rim.[3] Indeed, Hodder's Kansas City counsel who has litigated multi-piece rim cases for nine years never has attempted to join Motor Wheel as a defendant. Hodder's Kansas City counsel knows that the Metal Products Division of Goodyear was the only manufacturer of the KWX rim. Goodyear ceased all production of the KWX rim in 1962. Motor Wheel, though now a subsidiary of Goodyear, was not acquired by Goodyear until 1964, many years after the date of this rim's manufacture, and two years after Goodyear ceased all production of this rim type. Motor Wheel not only never manufactured the KWX rim nor any other type of K-rim, it was not even

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3. As the Court is aware, Hodder's Kansas City counsel in this action was both lead and liaison counsel in multi-district litigation proceedings dealing with multi-piece rims. He has had access to evidence garnered in four years of discovery conducted in those proceedings and the past two years of discovery conducted in this action.

a Goodyear subsidiary at the time the KWX rim was manufactured.

Motor Wheel was also not a "vendor" of the KWX rim. Goodyear ceased sales of the KWX in 1964. Motor Wheel never sold the KWX rim. Motor Wheel was not involved in the marketing of any Goodyear multi-piece rim until the late 1960's. Motor Wheel was not and could not have been involved in any way in the design, specification, development, manufacture or sale of the KWX rim.

C. *Complete Relief Can be Accorded Plaintiff Without Joinder of Motor Wheel.*

Denial of leave to amend to join Motor Wheel is particularly appropriate here as no prejudice will result to Hodder. Nowhere in Hodder's pleading does he assert that failure to join Motor Wheel will deprive the present parties of complete relief. Nowhere does he assert that failure to join Motor Wheel will subject those already parties to substantial risk of double or inconsistent liability. Nowhere does he claim that Motor Wheel has any interests relating to this action which it will be unable to protect absent joinder. See Rule 19, MRCP. Joinder is obviously not required pursuant to Rule 19.

D. *Leave to Join Motor Wheel Should Be Denied To Prevent the Complication of Issues, the Necessity of Discovery, And Undue Delay of the Proceedings.*

Because joinder would require discovery, complicate the issues, and delay the trial of this case, joinder is also not proper pursuant to Rule 20 or Rule 21. Despite knowledge of the facts recited in section B above, the proposed amended complaint charges both 1) that at the time of the design, development, manufacture, distribution,

licensing and sale of the subject K-type rim assembly "defendants" (Goodyear and Motor Wheel) knew or should have known that the design and construction of this rim were faulty (Second Amended Complaint, paragraph 5.); and 2) that Motor Wheel was the "vendor" of the K-type rim. Further, in paragraphs 3, 5, 6, 7, 8, and 9 of the proposed amended complaint, Hodder refers generally to "defendants" (Goodyear and Motor Wheel) and allege that defendants committed a variety of acts which would involve Motor Wheel as vendor or manufacturer. For example, in paragraph 7, Hodder alleges that "defendants, and each of them, breached express and implied warranties of merchantability and fitness for a particular purpose to the motoring public."

Goodyear knows of no factual basis for these charges. Hodder's Kansas City counsel knows that Motor Wheel Corporation neither manufactured nor sold the KWX rim. As a matter of law, no breach of express or implied warranty of merchantability or fitness for a particular purpose may be imposed against one who is neither a manufacturer or a distributor of a product.[4]

Moreover, Hodder's claims against Motor Wheel are so indefinite and ambiguous that neither Goodyear nor Motor Wheel can determine the factual basis for Motor Wheel's liability without further discovery. Hodder does not specify whether he alleges that Motor Wheel is independently liable for acts for which Goodyear is not liable, whether Goodyear is independently liable for acts committed by Motor Wheel as its agent, whether defendants' liability is concurrent, or whether Goodyear is indepen-

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4. No such claims are made in the original Complaint. Such claims are barred as a matter of law by the applicable Statutes of Limitation. See M.G.A. §336.2 - 725.

dently liable for acts not committed by Motor Wheel. Should Hodder's amendment be allowed, his failure to state the basis for the alleged liability of Motor Wheel and his failure to specify a factual basis for liability on the part of Motor Wheel will require discovery both with respect to Hodder's claim and Motor Wheel's defenses.

Finally, it can be assumed that if the injection of Motor Wheel as a party defendant is permitted, it will precipitate a cross claim by the Pioneer Rim and Wheel Co. ("Pioneer"). Pioneer has already cross claimed against Goodyear. Even if Pioneer does not cross claim against Motor Wheel, discovery to establish the basis of Hodder's claim that Pioneer acted as an agent on behalf of Motor Wheel will be necessary.

To allow Hodder to so complicate and delay resolution of the issues here cannot be justified. Hodder's counsel do not even attempt to justify their tardy attempt to join Motor Wheel. Hodder's Kansas City counsel has had hundreds of thousands of documents and thousands of pages of deposition testimony at his disposal for several years.[5] There is no newly discovered evidence, nor any factual basis to justify the belated joinder of Motor Wheel.

Conclusion

For the reasons stated, Motor Wheel is not needed for just adjudication of this litigation. Motor Wheel's joinder is not justified on the basis of facts known to Hod-

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5. Hodder's counsel procured the majority of the documents relied on here 10 years ago, in the 1974 case of *Messick v. Goodyear*, No. 74V756-W-2. Additional documents and deposition testimony were obtained by Hodder's Kansas City counsel between 1979 and 1982 through discovery proceedings in the *MDL 362*, the multi-piece rim litigation.

der. Motor Wheel's joinder would prejudice Goodyear, add new issues, require new discovery and unduly delay trial of this case. Goodyear respectfully requests that this court deny Hodder's motion to amend his complaint to join Motor Wheel.

Dorsey & Whitney
By /s/ James B. Vessey
James B. Vessey
Joel A. Flom
John W. Curran
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Telephone: (612) 340-2795
Attorneys for Defendant and Third Party Plaintiff, The Goodyear Tire & Rubber company
Attorney I.D. Numbers
112690 – James B. Vessey
126949 – Joel A. Flom
148726 – John W. Curran

Dated: August 16, 1984.

Of Counsel:

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APPENDIX F

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Court File No. 793068

Dale L. Hodder, Terry D. Hodder and Jeanette R. Hodder,
Plaintiffs,

vs.

The Goodyear Tire & Rubber Company, an Ohio corporation,

and

Pioneer Rim & Wheel Company, a Minnesota corporation,

and

The Goodyear Tire & Rubber Company, an Ohio corporation,
Defendant and Third-Party Plaintiff,

vs.

Remer Oil Company,
Third-Party Defendant.

THE GOODYEAR TIRE & RUBBER COMPANY'S CONSOLIDATED BRIEF CONCERNING DISCOVERY AND OTHER MOTIONS HEARD ON AUGUST 23-24, 1984

* * *

As to the issue of notice, Goodyear has stipulated in other cases and is willing to offer a stipulation in this case which will remove the need for Hodders to prove that Goodyear had notice of a potential danger which created a duty to warn. For the purposes of Hodders' "failure to warn" allegations only, Goodyear offers the following stipulation:

> By at least the mid-1970s, Goodyear had sufficient knowledge of the potential for pressurized separation of multi-piece rim assemblies so as to create a duty on Goodyear's part to make reasonable efforts to warn of that potential danger.

Goodyear is willing to concede that its duty to warn arose prior to the accident involved in this case. * * *

* * *

APPENDIX G

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Court File No. 793068

Dale L. Hodder,

Plaintiff,

vs.

The Goodyear Tire & Rubber Company, an Ohio corporation, Motor Wheel Corporation, an Ohio corporation, and Pioneer Rim & Wheel Company, a Minnesota corporation,

Defendants,

and

The Goodyear Tire & Rubber Company, an Ohio corporation,

Third-Party Plaintiff,

vs.

Remer Oil Company, Inc.,

Third-Party Defendant.

SEPARATE ANSWER OF THE GOODYEAR TIRE & RUBBER COMPANY TO PLAINTIFF'S AMENDED COMPLAINT

The Goodyear Tire & Rubber Company (hereinafter "Goodyear") for its Separate Answer to plaintiff's Amended Complaint states and alleges as follows:

FIRST DEFENSE

I.

Goodyear admits that it is a foreign corporation, that it has district offices located in Minneapolis, Minnesota, and that CT Corporation System is its registered agent for service of process in the State of Minnesota. Goodyear admits that the Motor Wheel Corporation is a wholly owned subsidiary of Goodyear. Goodyear is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 1.

II.

Goodyear is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 2.

III.

Goodyear denies paragraph 3.

IV.

Goodyear denies paragraph 4.

V.

Goodyear denies paragraph 5.

VI.

Goodyear is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 6.

VII.

Goodyear denies paragraph 7.

VIII.

Goodyear denies paragraph 8.

IX.

Goodyear denies paragraph 9.

SECOND DEFENSE

X.

Goodyear alleges that plaintiff's Amended Complaint against it fails to state a claim upon which relief can be granted.

THIRD DEFENSE

XI.

Goodyear alleges upon information and belief that plaintiff Dale Hodder's injuries or damages, if any, were caused or contributed to by the conduct, the activities, and the manner or work being done by Dale Hodder's employer, Remer Oil Company, or others over whom Goodyear had no control and for whose conduct Goodyear cannot be held liable, said conduct constituting an intervening superseding cause of plaintiff Dale Hodder's alleged injuries or damages.

FOURTH DEFENSE

XII.

Goodyear alleges that the injuries allegedly sustained by plaintiff Dale Hodder were sustained following the expiration of the ordinary useful life of the rim involved.

FIFTH DEFENSE

XIII.

Goodyear alleges upon information and belief that plaintiff's claims are barred, since Remer Oil Company was a sophisticated user of wheel, rim, and tire products.

SIXTH DEFENSE

XIV.

Goodyear alleges that the "fault" of Goodyear, if any, for which it might be held liable to plaintiff is less than the "fault", including contributory negligence, misuse, and assumption of the risk, of Dale Hodder; therefore, plaintiff may not recover against Goodyear.

SEVENTH DEFENSE

XV.

Goodyear alleges upon information and belief that plaintiff's claims, or some of them, may be barred by the applicable statutes of limitations.

EIGHTH DEFENSE

XVI.

Goodyear alleges that plaintiff Dale Hodder has failed to mitigate his damages, if any.

NINTH DEFENSE

XVII.

Goodyear alleges that plaintiff Dale Hodder is not the real party in interest with respect to, and lacks standing to assert, claims for damages covered by the

Minnesota Workers' Compensation Statutes, including but not limited to, past and future wage loss, permanent disability, rehabilitation, and medical expenses.

TENTH DEFENSE

XVIII.

Goodyear alleges that plaintiff Dale Hodder was employed in violation of the Minnesota Child Labor Law, and that as a result, his employer, Remer Oil Company, is absolutely and exclusively liable for plaintiff's injuries.

WHEREFORE, The Goodyear Tire & Rubber Company demands judgment against plaintiff dismissing the Amended Complaint with prejudice and awarding to The Goodyear Tire & Rubber Company its costs and disbursements herein.

Dated: April 18, 1985

Dorsey & Whitney
By /s/ James B. Vessey
James B. Vessey
(#112690)
John W. Curran
(#148726)
2200 First Bank Place East
Minneapolis, Minnesota 55402
(612) 340-2795/2890
Attorneys for Defendant The
Goodyear Tire & Rubber Company

APPENDIX H

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

File No. 793068

Dale L. Hodder,
Plaintiff,

vs.

The Goodyear Tire & Rubber Company, an Ohio corporation, Motor Wheel Corporation, an Ohio corporation, and Pioneer Rim & Wheel Company, a Minnesota corporation,
Defendants,

and

The Goodyear Tire & Rubber Company, an Ohio corporation,
Third-Party Plaintiff,

vs.

Remer Oil Company, Inc.,
Third-Party Defendant.

SEPARATE ANSWER OF MOTOR WHEEL CORPORATION TO PLAINTIFF'S AMENDED COMPLAINT

Motor Wheel Corporation (hereinafter "Motor Wheel") for its Separate Answer to Plaintiff's Amended Complaint states and alleges as follows:

FIRST DEFENSE

I.

Motor Wheel admits that it is the wholly owned subsidiary of The Goodyear Tire & Rubber Company, that it is an Ohio corporation, that it has offices located in Lansing, Michigan, and that CT Corporation System is its registered agent for service of process in the State of Minnesota. Motor Wheel denies that it is qualified to do business in the State of Minnesota. Motor Wheel is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 1.

II.

Motor Wheel is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 2.

III.

Motor Wheel denies Paragraph 3.

IV.

Motor Wheel denies Paragraph 4.

V.

Motor Wheel denies Paragraph 5.

VI.

Motor Wheel is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 6.

VII.

Motor Wheel denies Paragraph 7.

VIII.

Motor Wheel denies Paragraph 8.

IX.

Motor Wheel denies Paragraph 9.

SECOND DEFENSE

X.

Motor Wheel alleges that Plaintiff's Amended Complaint against it fails to state a claim upon which relief can be granted.

THIRD DEFENSE

XI.

Motor Wheel alleges upon information and belief that plaintiff Dale Hodder's injuries or damages, if any, were caused or contributed to by the conduct, the activities, and the manner or work being done by Dale Hodder's employer, Remer Oil Company, or others over whom Motor Wheel had no control and for whose conduct Motor Wheel cannot be held liable, said conduct constituting an intervening superseding cause of Plaintiff Dale Hodder's alleged injuries or damages.

FOURTH DEFENSE

XII.

Motor Wheel alleges that the injuries allegedly sustained by Plaintiff Dale Hodder were sustained following

the expiration of the ordinary useful life of the rim involved.

FIFTH DEFENSE

XIII.

Motor Wheel alleges upon information and belief that plaintiff's claims are barred, since Remer Oil Company was a sophisticated user of wheel, rim, and tire products.

SIXTH DEFENSE

XIV.

Motor Wheel alleges that the "fault" of Motor Wheel, if any, for which it might be held liable to plaintiff is less than the "fault," including contributory negligence, misuse, and assumption of the risk, of Dale Hodder; therefore, plaintiff may not recover against Motor Wheel.

SEVENTH DEFENSE

XV.

Motor Wheel alleges upon information and belief that plaintiff's claims, or some of them, may be barred by the applicable statutes of limitations.

EIGHTH DEFENSE

XVI.

Motor Wheel alleges that Plaintiff Dale Hodder has failed to mitigate his damages, if any.

NINTH DEFENSE

XVII.

Motor Wheel alleges that Plaintiff Dale Hodder is not the real party in interest with respect to, and lacks standing to assert, claims for damages covered by the Minnesota Workers' Compensation Statutes, including but not limited to past and future wage loss, permanent disability, rehabilitation, and medical expenses.

TENTH DEFENSE

XVIII.

Motor Wheel alleges that Plaintiff Dale Hodder was employed in violation of the Minnesota Child Labor Law, and that as a result his employer, Remer Oil Company, is absolutely and exclusively liable for plaintiff's injuries.

WHEREFORE, Motor Wheel Corporation demands judgment against plaintiff dismissing the Amended Complaint with prejudice and awarding to Motor Wheel Corporation its costs and disbursements herein.

Dated: February 12, 1985.

Dorsey & Whitney

By .....

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APPENDIX I

(Filed April 11, 1986)

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

File No. 793068 N

Dale L. Hodder,
Plaintiff,

vs.

The Goodyear Tire & Rubber Company, an Ohio corporation, Pioneer Rim & Wheel Company, a Minnesota corporation, and Motor Wheel Corporation, an Ohio corporation,
Defendants,

and

The Goodyear Tire & Rubber Company, an Ohio corporation, and Motor Wheel Corporation, an Ohio corporation,
Defendants and Third-Party Plaintiffs,

vs.

Remer Oil Company, Inc., a Minnesota corporation,
Third-Party Defendant,

and

Pioneer Rim & Wheel Company, a Minnesota corporation,
Defendant and Third-Party Plaintiff,

vs.

Acheson Tire Company, a Minnesota corporation, Arrowhead Equipment Company, a Minnesota corporation, and Itasca Tire Company, a Minnesota corporation,
Third-Party Defendants.

ORDER RE: MOTIONS IN LIMINE AND OTHER PRETRIAL MOTIONS

* * *

4. Goodyear and Motor Wheel's motion to strike from the plaintiff's Amended Complaint all allegations of a duty to recall or retrofit, and Goodyear and Motor Wheel's motion *in limine* to preclude plaintiff's counsel from introducing evidence or making reference during argument to any alleged duty to recall or retrofit is denied. Such evidence is probative of the reasonableness of Goodyear and Motor Wheel's actions with respect to their duty to warn and their possible assumption of a duty to recall.

5. Goodyear and Motor Wheel's motion *in limine* to exclude evidence of the consideration given by Goodyear or Motor Wheel to the use of warning labels in 1975 and 1976 is denied. Evidence of Goodyear or Motor Wheel's activities with respect to warning labels is probative of the overall duty to warn, and the probative value of such evidence outweighs any potential prejudicial impact upon the defendants.

* * *

APPENDIX J

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL
DISTRICT

Court File No. 793068

Dale L. Hodder,
Plaintiff,

v.

The Goodyear Tire & Rubber Company, an Ohio corporation, Pioneer Rim & Wheel Company, a Minnesota corporation, and Motor Wheel Corporation, an Ohio corporation,
Defendants,

and

The Goodyear Tire & Rubber Company, an Ohio corporation and Motor Wheel Corporation,
Defendants and Third Party Plaintiffs,

v.

Remer Oil Company, Inc., a Minnesota corporation,
Third Party Defendant,

and

Pioneer Rim & Wheel Company, a Minnesota corporation,
Defendant and Third Party Plaintiff,

v.

Acheson Tire Company, a Minnesota corporation; Arrowhead Equipment Company, a Minnesota corporation; and Itasca Tire Company, a Minnesota corporation,
Third Party Defendants.

PLAINTIFF'S TRIAL BRIEF

* * *

B. Liability For Failure To Warn And Instruct.

The Minnesota Courts have also recognized the merger of strict liability and negligence concepts in failure to warn cases. *Bilotta, supra,* at 622; *Germann v. F. L. Smithe Machine Co.,* No. C9-85-1442 (Minn.App., Feb. 18, 1986, p. 12); *Peterson v. Little-Giant Glencoe Portable Elevator Division of Dynamics Corporation of America,* 349 N.W.2d 280, 284 (Minn.App. 1984); reversed on other grounds 366 N.W.2d 111 (Minn. 1985); *Hauenstein v. Loctite Corp.,* 347 N.W.2d 272, 275 (Minn. 1984). This recognition is embodied in J.I.G. III-118 wherein the differentiation between strict liability and negligent failure to warn consists merely of the "label" given to the instructions.

1. Defendants had a duty to give warning and instruction adequate both in content and method of communication to all foreseeable users, including Hodder.

Under Minnesota law, a manufacturer has a duty to adequately warn and instruct foreseeable users of dangers involved in the use of its product. *Germann, supra* at 12; J.I.G. III-118. This duty is enhanced by the fact that product manufacturers are "held to possess the skill of an expert in the field and are obliged to keep informed of scientific discoveries in the field." *Bertrand v. Johns-Manville Sales Corp.,* 529 F.Supp. 539, 542 (D. Minn. 1982); *Willmar Poultry Co., supra; O'Hare v. Merck & Company, Inc.,* 381 F.2d 286, 291 (8th Cir. 1967).

The scope of the manufacturer's duty to adequately warn and instruct is measured in both quantitative and

qualitative terms. From a quantitative standpoint, the Minnesota Courts have held that the duty to warn "extends to all reasonably foreseeable users." *Hauenstein, supra*, at 275; *Germann, supra; Smits v. E-Z Por Corporation*, 365 N.W.2d 352, 355 (Minn.App. 1985). Foreseeability must take into account the manufacturer's status as an expert in the field - in this case multi-piece truck rims. Despite this requirement, neither Goodyear/Motor Wheel nor Pioneer bothered to provide any warning or instructional information to Hodder or the Remer Oil Company. None of the defendants can seriously contend that Hodder and Remer Oil were not foreseeable "users" of the K-Rim.

Additionally, where the use of a product poses great danger the courts have held that the manufacturer must take greater steps to insure the communication of an adequate warning to the ultimate user. The United States Court of Appeals for the Eighth Circuit in *Hopkins v. Chip-in-Saw, Inc.*, 630 F.2d 616 (8th Cir. 1980); held,

> When a manufacturer can reasonably foresee that the warnings it gives to a purchaser of its product will not be adequately conveyed to probable users of the product, then its duty to warn may extend beyond the purchaser to those persons foreseeably endangered by the product's use. Warnings given to the purchaser do not necessarily insulate the manufacturer from liability to injured users of the product.

Id. at 619. Specifically in the multi-piece rim explosion context, the Eighth Circuit held in *Griggs v. The Firestone Tire & Rubber Company*, 513 F.2d 851 (8th Cir. 1975); that,

> If the danger involved in the ignorant use of a particular chattel is very great, it may be that the supplier does not exercise reasonable care in entrusting the communication of the necessary information even to a person whom he has good reason to believe to be careful.

Id. at 858. Goodyear/Motor Wheel failed to adhere to this duty. Importantly, Pioneer even had an opportunity to physically deliver such information to Dale Zorman, owner of Remer Oil Company, once when Mr. Zorman purchased wheels at Pioneer and on several occasions when Pioneer's representative Don White drove through Remer, Minnesota. Defendants have miserably failed to satisfy the quantitative aspects of their duty to warn.

Warning and instructional adequacy is also evaluated in qualitative terms. J.I.G. III-118 provides,

> For a warning to be adequate it must be set out in such a way that heeding the warning will make the product reasonably safe for use. The warning must be in a form which could reasonably be expected to catch the attention of, and be understood by, the ordinary user.

Thus, qualitative adequacy is judged both in the form and method of communication the warning and instruction takes as well as its content. In *Griggs*, plaintiff was severely injured by the explosive disassembly of a multi-piece truck rim manufactured by Firestone. Upholding the jury's finding that Firestone breached its duty to warn plaintiff, the Court concluded,

> Many such articles can be made to carry their own message . . . indicating with a substantial sufficiency

> their dangerous character. Where the danger involved in the ignorant use of their true quality is great and such means of disclosure are practicable and not unduly burdensome, it may be well that the supplier should be required to adopt them.
>
> By any standard, the danger inhering in defendant's products must be deemed great: there is an obvious potential for severe injury from wholly unanticipated explosion of wheel assembly under great pressure in close proximity to the repairman. As Firestone acknowledges in its warning literature, the resulting harm may easily be grievous body injury or even death. . . . [A]s noted in the Restatement, reasonable care may dictate that a warning be impressed directly on the article when (as here) the danger is great and such a warning would not be impracticable or unduly burdensome. Plaintiff presented testimony from which the jury could find that such a warning was practicable and, since Firestone already impresses identification information on its rim parts, the jury could obviously find that the impressing of additional warning information was not unduly burdensome.

Id. at 858, 859. Additionally, it is well settled in Minnesota that an adequate warning must warn of *all* dangers associated with the use of the product. *Blasing v. P.R.L. Hardenbergh Co.*, 226 N.W.2d 110, 115 (Minn. 1975); *Karjala v. Johns-Manville Products Corp.*, 523 F.2d 155, 158 (8th Cir. 1975).

Hodder's evidence will be that defendants' efforts to warn and instruct him were inadequate both in content and method of communication. Hodder anticipates that

defendants will extol the virtues of their warning and instructional information and their efforts to disseminate that information. However, such information, even if it had been provided to Hodder, fails to satisfy defendants' duty to warn and instruct because it does not warn the ultimate user or consumer of the defects present in the K-rim design, nor does it instruct in the procedure necessary to avoid the danger posed by the defects. Further, despite the admonition of the Eighth Circuit in *Griggs*, which Hodder's evidence shows was communicated directly to Goodyear/Motor Wheel, it never placed any on-product warnings on multi-piece rims, including the K-rim. Considering the serious danger posed by the K-type assembly under inflation pressure, on-product warnings and instructions containing the detailed information set forth above were required by Minnesota law.

2. Defendants have a continuing duty to warn and instruct.

The duty of Goodyear/Motor Wheel and Pioneer to warn and instruct continues well past the date of manufacture or sale of the subject K-type rim. In *Leskey v. Heath Engineering Co.*, 293 N.W.2d 39, 41 (Minn. 1980), the Supreme Court found the defendant manufacturer of a cutting machine liable for failure to warn of dangers arising from foreseeable changes in the product occurring after the product left defendant's control. The Court in *Germann, supra*, reached a similar conclusion. No. C9-85-1442 (Minn. App., Feb. 18, 1986, pg. 13) This continuing duty to warn is consistent with the Minnesota requirements that the manufacturer keep apprised of all scientific developments in its field of expertise. *Willmar Poultry Co., supra*. Even though Hodder will prove that

Goodyear/Motor Wheel knew prior to the manufacture of the subject K-rim that it was defective and unreasonably dangerous, that knowledge continued to accumulate in the years prior to 1981 when Hodder was injured. Such a continuing duty is especially important where the product involved is one that has an undefined useful life and is likely to exist in the marketplace for many years. Knowing this to be the case, Goodyear/Motor Wheel and Pioneer have a duty, especially toward younger and more inexperienced users such as Dale Hodder, to disseminate warning and instructional information on a continuing basis. *See, Frey v. Montgomery Ward & Co., Inc.*, 258 N.W.2d 782, 786 (Minn. 1977).

This continuing duty to warn, or obligation to impart information regarding a product when it is, or should be, obtained, is well recognized in other jurisdictions as well. In the leading case, *Comstock v. General Motors Corp.*, 99 N.W.2d 627 (Mich. 1959), defendant discovered a defect in the brakes of its 1953 model Buicks after many had been manufactured and sold. However, it did not warn the purchasers of the automobiles of the defect. Addressing defendant's continuing duty to warn of defects discovered after the product is placed in the hands of the consumer, the Court held,

> If such a duty to warn of a known danger exists at the point of sale, we believe a like duty to give prompt warning exists when a latent defect which makes the product hazardous to life becomes known to the manufacturer shortly after the product has been put on the market.

Id. at 634. Other cases in which a manufacturer or seller was found liable for failing to warn of defects and dan-

gers discovered after the sale or delivery of the product are *Jet America, Inc. v. Gates Learjet Corp.*, 243 S.E.2d 584 (Ga.App. 1978); *Braniff Airways, Inc. v. Curtis Wright Corp.*, 411 F.2d 451 (2d Cir. 1969); *Sterling Drug, Inc. v. Cornish*, 370 F.2d 82 (8th Cir. 1967); and *American Oil Co. v. Nicholas*, 157 S.E. 754 (Va. 1931).

3. Defendants have a duty to conduct consumer notification or product withdrawal when other warning efforts fail.

The duty to conduct a consumer notification, withdraw the offensive product from production or conduct a recall campaign, is nothing more than the outgrowth of a manufacturer's continuing duty to warn and instruct. If the manufacturer has knowledge that its product is defective or dangerous and its warnings and instructions do not protect the consuming public from harm, then it must take remedial action in one of the forms suggested above. This duty was recognized by the United States Court of Appeals for the Eighth Circuit in *Kehm v. Proctor & Gamble Manufacturing Co.*, 724 F.2d 613 (8th Cir. 1983); wherein the Court upheld the trial Court's admission of plaintiff's evidence that defendant withdrew its Rely tampons after receiving pressure from the Food & Drug Administration. The Court held that the evidence was not only admissible to rebut defendant's claims that the withdrawal of the product was voluntary but,

> . . . also to show the existence or nonexistence of a *duty* to withdraw the product.

Id. at 622. [Emphasis supplied] It is important to note that the "withdrawal" discussed in *Kehm* involved not only ceasing production of Rely tampons, but their removal from the marketplace.

Further, in the case of motor vehicle manufacturers such as Goodyear/Motor Wheel, such a duty is directly imposed by federal law. The National Traffic Motor Vehicle Safety Act (NTMVSA), 15 U.S.C. § 1411 requires the motor vehicle manufacturer who discovers a defect relating to motor vehicle safety in one of its products to remedy the defect by recall if necessary. NTMVSA, 15 U.S.C. § 1411, provides:

> If a manufacturer—
>
> (1) obtains knowledge that any other motor vehicle or item of replacement equipment manufactured by him contains a defect and determines in good faith that such defect relates to motor vehicle safety; or
>
> (2) determines in good faith that such vehicle or item of replacement equipment does not comply with an applicable Federal Motor Vehicle Safety Standard prescribed pursuant to §1392 of this Title;
>
> he shall furnish notification to the secretary and to owners, purchasers, and dealers, in accordance with §1413 of this Title, and he shall remedy the defect or failure to comply in accordance with §1414 of this Title.

15 U.S.C. § 1414 provides in relevant part:

> (a) . . .
>
> (2)(A) in the case of a motor vehicle presented for remedy pursuant to such a notification, the manufacturer . . . shall cause the vehicle to be remedied by whichever of the following means he elects:
>
> (i) by repairing such vehicle.

(ii) by replacing such motor vehicle without charge, with an identical or reasonably equivalent vehicle.

(iii) by refunding the purchase price of such motor vehicle, in full, less a reasonable allowance for depreciation . . .

(a) . . .

(2)(B) . . .

(4) The requirement of this section that remedy be provided without charge shall not apply if the motor vehicle or item of replacement equipment was purchased by the first purchaser more than eight (8) calendar years . . . before (A) notification respecting the defect or failure to comply is furnished pursuant to §1411 of this Title . . .

Clearly, the provisions of NTMVSA require a manufacturer who discovers a defect in a product to notify the Department of Transportation and members of the consuming public of the defect. Further, the Act requires that once notification is made, the manufacturer take action to remedy the defect. Hodder will prove unequivocally that Goodyear/Motor Wheel had the requisite prior knowledge of the defect and dangers in the use of K-type multi-piece rims and that those defects and dangers were substantial. The existence of a demand by the National Highway Traffic Safety Administration (NHTSA) to recall the K-type rim in 1979 and the existence of approximately 170 other occurrences of explosive separation of K-type multi-piece rims alone are sufficient to impose a duty to recall upon Goodyear. It is important to note that even though 15 U.S.C. § 1414 does not require manufac-

turers to undertake a remedy entirely free of charge for products over eight years of age, their duty to nevertheless undertake such a remedy is not affected.

In addition to the duty imposed by NTMVSA, Goodyear's Chairman of the Board, Charles J. Pilliod, Jr., on August 21, 1974, wrote to all officers and employees of Goodyear and its subsidiary companies that they were directed to give "complete dedication" to the "better safe than sorry" policy of product safety (Plaintiff's Exhibit 83). Pilliod wrote that "a product defect which creates a risk of injury to the person using the product is considered a safety-related defect." *Id.* Echoing Pilliod's charge, Goodyear's Vice President of Product Quality & Safety, Robert Milk, in 1983, testifying by deposition in *Alban v. The Goodyear Tire & Rubber Company*, No. 82-13706-CA-18, Circuit Court in and for Dade County, Florida, confirmed that Goodyear had a duty in the interest of public safety to recall a product if it was discovered to be defective (Plaintiff's Exhibit 189). Such testimony constitutes an admission against interest of Goodyear/Motor Wheel. Based on this knowledge Goodyear/Motor Wheel conducted a "Safety Exchange Program" in 1977 aimed at getting multi-piece rims twelve years old or older off the road. Pioneer "participated" in the program. However, Goodyear/Motor Wheel offered such an economically unattractive exchange that the program was a complete failure. In 1982, Goodyear/Motor Wheel wrote to Pioneer and requested a special program to remove K-rims from service in Minnesota. The program never came to fruition because Pioneer refused to voluntarily assume any responsibility for the program. Thus, even if no duty pre-existed these programs, defendants assumed the duty to remove older rims from service (which would have included the

subject K rim) and were legally bound to exercise due care in the completion of that duty. *See,* Section I.D., *infra.* Yet, despite their recognition of a serious problem, defendants never developed a product exchange program reasonably calculated to remove multi-piece rims from service.

Hodder does not seek an order of this Court compelling Goodyear/Motor Wheel to recall the K-type rim and does not suggest that the Court has the authority to order such a recall. Rather, defendants' knowledge of the inherent defect and danger of the K-type rim combined with their inadequate efforts and results in warning and instruction, left them only one choice in the interest of public safety—remedial action in the form of product withdrawal, consumer notification or recall.

* * *

APPENDIX K

OPENING STATEMENT OF GOODYEAR COUNSEL

* * *

[2633] Every time Goodyear and every year Goodyear has looked at why accidents are happening, every expert, like whether it be Bob Harold or Gerhart Gerbeth or Bob Smith, who I'm going to start talking about now, they have found that the solution to solving accidents with truck rims is proper training. So that defines the problem.

You have many, many experts, many, many experts at Goodyear and outside of Goodyear, leading experts in this country and the government, all looking at safety with truck rims, and the solution is proper training, follow industry safety practices.

Now, let me start a story on the third section of what I wanted to talk to you about, and that deals with warnings. The plaintiff has claimed that we failed to warn about the dangers, potential dangers in working on truck rims if you don't do it right, don't follow standard safety practices. He claims we failed to warn.

The fact is that Goodyear has conducted a massive and systematic warning campaign designed to reach the 330,000 tire servicemen in this [2634] country about the safe way to use multi-piece rims and single-piece rims, rims of any design. This program has been studied, outside experts have been consulted, it's been improved, it's been intensified, and we have done everything that

can be reasonably required of a manufacturer to warn about the potential danger with truck rims and how to avoid it.

There's one important thing to keep in mind in this case, and it's one of common sense. Goodyear is a manufacturer. Goodyear makes the rims, but it doesn't sell the rims to Mr. Zorman who runs Remer Oil, it doesn't sell the rims to other tire shops in Minnesota. It sells rims to distributors, and the distributor for Firestone rims and Goodyear rims in the State of Minnesota is Pioneer Rim and Wheel.

Some of the witnesses in this case will be two people from Pioneer Rim and Wheel, a Don White and a John Cousins. And so you see that we have no control over what happens in the work place. We don't employ Dale Hodder, we can't hire and fire Dale Hodder. We have no business relationship even with Remer Oil.

Training, training has to be done by the [2635] employer. The manufacturer cannot train. GM doesn't train everybody to drive a car.

At various points and many points, at all points Goodyear studied in the field how the product was being used. Let me start a story with Bob Smith. He will be one of our witnesses in this case. Bob Smith is what Motor Wheel calls a field engineer. He is employed by the Motor Wheel Corporation. Gerhart Gerbeth you will learn when he takes the stand is a rim design engineer, and he goes out in the field and investigates accidents, but Bob Smith is a field engineer and he works out in the field all the time.

In the early 1970s, because of Goodyear's concern about accidents with truck rims, all truck rims, and

what they could do to help warn and educate people to follow safety practices, they asked Bob Smith to do a study, a study in the field. And he went out into the field, and this is in 1972, November of 1972.

Now, who was concerned enough to ask Bob Smith to do a study? It was the top management in Goodyear. They are concerned because any time there's an accident with a Goodyear product, they are extremely concerned. And they asked Bob, [2636] the top people at Goodyear were concerned enough to ask Bob Smith and others like him, I'm using Bob Smith as my example now, in November of '72 to study accidents. He did three things. He looked and went out to the field and examined how tire servicemen were working on the product.

[2637] He traveled to the tire shop and looked to see what safety practices were being followed. Bear in mind for years Goodyear had mailed safety literature and distributed safety literature to tire shops and tire people that work on these rims, and so the safety literature was being mailed out. So Goodyear wanted to know whether people were paying attention to this safety literature.

Bob Smith was out in the field examining this and making a formal report in November of 1972 through April 1973. He also looked at accident files, the same files that the government has looked at and found that the accidents were caused by improper assembly, the same files that you will see in this case. He studied accident files and investigations by people like Gerhart Gerbeth and other experts who have investigated accidents and by people who collected information on how an accident happened. That's the second thing he did.

Then he visited the government and got the government's attitude and what they had done and what they had found. He went to the DOT, and the DOT informed him that Goodyear was one of the most safety-minded companies—

MR. FLASKAMP: (Interposing) Your Honor, [2638] that's improper argument.

MR. HENDRICKS: That was part of his—

THE COURT: Excuse me, the objection is sustained.

MR. HENDRICKS: That was part of the study, those three things. And in April of 1973, April 5th, 1973, he issued a multi-page study, a twelve page study about accidents. And what did he find? He found that accidents were being caused by people using, number one, damaged and bent parts, number two, misassembly, and three, improper servicing techniques like using a hammer, the same things that Goodyear has always made with respect to its investigation of accidents.

Bob Smith was also asked to make any recommendation he could to help improve safety in the workplace and what could Goodyear do about it.

After making these findings—in addition, I should say another one of his findings would be that safety practices were not always followed in the workplace. People weren't always following Goodyear's instructions on how to use the product.

So with those things, Bob Smith went to the vice president of safety at Goodyear. He presented these findings to Goodyear people, he presented his findings to [2639] his superiors at Motor Wheel, so they would know his study and his concerns and what his recommendations

were. This was part of Goodyear's overall effort. He wasn't the only person working on rim safety in the early 70's, but he is just one person.

So he went to the vice-president of safety because they were concerned, and they then talked about his recommendations and what could be done.

Then he went to a third group. He went to Lansing and talked to the rim design engineering team headed by Gerhart Gerbeth, and he talked to him about his findings so that people would know how rims were being used in the field, and he made several recommendations and several ideas. One of his ideas was that the warning literature should be improved with pictures in the warning literature so that people would know what a damaged rim looks like. So the warning literature was re-designed so it could be more communicative. That was done as a result of Bob Smith's study.

He also recommended that Goodyear produce a safety film, and Goodyear produced a safety film which is called "You may not get a second chance". Now, why do you call it "You may not get a second chance"? Well, it's because there are two goals that Goodyear tries to accomplish in all its warning literature. It [2640] tries to impress upon the tire serviceman that there can be a danger in working on this product if you don't work on it correctly, if you don't follow safety practices. So they titled it "You may not get a second chance."

And in all of the warning literature that Goodyear puts out, they try to emphasize the fact that serious injury or death can result from the misuse of the product. So education, that's what they are after. And then once you do that, once you educate a person about the potential

danger, then you tell them how to do it correctly, how to work on it correctly.

Now, in addition to the film, there were about six other ways in which Goodyear's warning effort went forward. Goodyear designed safety charts and wall posters, and now it's an accepted safety rule and accepted safety practice in the industry to have posted safety charts. We will show you in our presentation the kind of safety charts that Goodyear developed and designed. These charts tell you how to assemble a rim, they show you through pictures the proper assembly techniques for all of major rim designs, and they are to be posted in the workplace. This is an accepted industry safety rule to post these kind of charts.

[2641] That safety chart tells the workmen, don't use bent, distorted, broken parts. It tells the workmen to correctly assemble it. It tells the workmen about the potential dangers if you don't do it correctly. It tells the workmen to not hammer on an inflated assembly, particularly to try and correct a problem of a bend in a product. Those are safety rules.

Another form of literature developed by Goodyear are the safety manuals. Goodyear has found that the best way to communicate all of the proper ways of working on each of the rim types that all of the manufacturers have is to put them in a manual in the workplace. So now it's an accepted safety rule that you have safety manuals in the workplace, and Goodyear distributes them.

Another way that Goodyear tries to warn workmen is through catalogs. All of Goodyear's catalogs have safety instructions, safety material in the catalog itself.

Again, just like in the safety manuals, there are basic safety rules in the catalogs, and one of them is that you throw away a bent or distorted, heavily corroded part, that you don't use it because it can be dangerous. You must assemble it properly and use proper assembly procedures, a proper safety cage, and you must not hammer on an inflated [2642] assembly.

I have mentioned the film. Let me now mention another way to reach the three hundred and thirty thousand tire servicemen in the country, and that is articles. Goodyear has people that work on the safety program, and one of them we are going to have testify in this case is Phil Rosenberger, and he has spend decades in designing and working and himself going out in the field and going to tire conventions and studying the best way of communicating with tire servicemen.

[2643] What Goodyear has done is actually written articles and have them published in trade journals, trade journals that are sent to tire service shops. These articles discuss the way to work on a rim safely.

By the way, ads. I'll put ads up for advertisements. In all trade journals, Goodyear published advertisements about the safety literature and the need for safety, sometimes developing its communication message in forms of cartoons, various means of studied ways of communicating how to work on a tire, truck rim assembly safely. So those last two deal with the trade publications that are sent out to people at tire service shops.

Then the last way is something that Goodyear has done. It's worked extensively with the Federal Government.

How are these materials distributed? Through its research, Goodyear obtains names of all the tire service shops it can find and it mails this literature. So it conducts what we call notification campaigns, or mailing campaigns, with safety manuals, safety charts and what we call safety kits—are mailed across the country to tire service shops.

[2644] Then Goodyear-Motor Wheel salesmen actually travel the country to deliver the safety message that Goodyear wants to present.

You will see in this case that people from Goodyear and Motor Wheel actually came up to the State of Minnesota to show the film, where they could find tire servicemen to show the film to.

Now, people distributed warning literature. Goodyear speaks at the conventions and trade shows about the need for safety and promoting safety.

Now, besides its own salesmen and besides the mailing and notification campaign that Goodyear has been doing with great intensity over the years, there's another way in which Goodyear gets out the safety message it has. That is through its distributors.

I'm back again to my point that Goodyear makes the product but it neither distributes it in Minnesota nor does it sell it to people in Minnesota or any other state. But distributors like the one in Minnesota, which is located in Minneapolis, has salesmen, salesmen that go around to tire service shops. Goodyear has instructed its distributors at any time that they call on a tire service shop to leave its safety brochures, [2645] charts, manuals. This way is another means of getting out the safety message.

Now, these things have been done and analyzed. As I said, there has been improvements and studies by people as the best way to get the message across on safety. They've been done for years. The message is reaching tire servicemen.

Now, it will be our point in the case that people should either know or should have known about the potential dangers in working on multi-piece rims or single piece rims if you don't do it correctly.

Now, besides the safety programs that were improved and intensified after Bob Smith's study in the 1970s—I mentioned another thing, that Goodyear worked with the Government. In 1974 the government went to Goodyear, Mr. Gerhart Gerbeth, to head the ad hoc committee to design the first warning posters for the government. You see, the DOT was interested in safety also. They have designed warning posters, warning charts of their own, the Department of Transportation, NHTSA.

And who do they go to to head the committee? They go to Goodyear. Mr. Gerbeth was appointed chairman of that committee. He [2646] designed the first warning literature for the Federal Government.

Now, that's not the only way that Goodyear has gone to the Federal Government. It's actually petitioned the Federal Government. It's petitioned the Federal Government to look at hazards with multi-piece rims and study it, and asked the government to do all it could. So it's been a joint effort.

Goodyear also has investigated other ideas. That takes me to another subject. One of the ideas that Bob Smith proposed and recommended, and which Goodyear did and

which other engineers proposed—is there a foolproof device that Goodyear engineers could come up with that would prevent a misassembly? In other words, prevent any human error. Engineering programs were pursued with Goodyear to see if there were any foolproof devices. Can engineers working on the problem of people misusing the product develop a device which is prohibitive? Various things were studied. You can continue studying these things, but none were practical. For instance, remember this rim was last made in 1968, but they were working on latching devices for the L rim, [2647] things that would latch the rim and see if that wouldn't improve safety and on test after test after test and material after material after material was tested. Latching devices just don't work. They don't work on the K rim, they don't work on that rim (indicating) and they don't improve the performance of the rim.

Now, every time there is a circle of the wheel there is additional load placed on the rim. It actually flexes. We'll talk about some of the engineering requirements of any latching device and some of the tests and all the things they developed, but the conclusion is, universally, whether it be Firestone or anybody in the industry, latching devices don't work and would not be effective. There is no latching device by any manufacturer in this country for that very reason. Firestone has tried it, Goodyear has tried to develop it. They just don't work. Tests show they don't work.

Now, Goodyear has studied whether warning labels would be an effective way of communicating the danger, potential danger, of working on rims if you misused the product. It's had experts advise us on warning labels. It's

designed [2648] warning labels. It's the conclusion of all experts, number one, it's impractical.

It's impractical because rims are subjected to the corrosive elements of weather and road salts from the very beginning and they won't last. There's nothing that you can do to place a label on there that is going to last 26 years.

Of course when this rim was made in 1955, labels were not used on any products and we think the plaintiff's counsel here is giving you a little bit of a red herring. But let me explain it this way. He is saying that the warning labels should have gone on this rim or the single-piece rim, should have gone on the L rim in 1976 (indicating).

A lot of experts have studied this, including Dr. Roger McCarthy, who has studied this more than probably any other person in the country, including the government, including other manufacturers. Warning labels don't work.

Communication experts, communication experts have found this fault with warning labels on truck rims. You can't put all the assembly techniques, you can't train a tire serviceman with [2649] a warning label, you can only put on a very limited amount of information, and you may be emphasizing one piece of information over the other. So there are technical problems in terms of communication in what experts in the communications say with warning labels.

It all comes back, every expert that has looked at the safety and the way to get out the safety message, it all comes back to training, that's the solution.

So where are we now? We're at a point in our study of rim accidents, truck rim accidents where the solution is what Bob Smith said it was in 1973 and what the government says now: Training. And that's the first word in one of Goodyear's safety manuals, do not work on these rims unless you are trained. Use rim manuals and all charts, safety rules, use a safety cage. Don't hammer on inflated truck rim assemblies.

* * *

APPENDIX L

ARGUMENTS OF GOODYEAR COUNSEL

* * *

[942] Then he goes out into the field and he's telling people at Goodyear some of the things he found, and he says, "In general, field practices are poor," and that's why Goodyear put out all the warning literature that you [943] will hear about after 1973, that is why Goodyear sent around its own salesmen after 1973 to show films, and you will hear a lot of that come in through what Pioneer did. Pioneer put on warning literature to get—to tell people that they need to maintain the product.

Now, one of the things Goodyear did, and we'll offer that in the trial, Your Honor, is it produced a film following Bob Smith's memo. As part of its education and safety efforts it produced a film in 1977 which was called "You May Not Get a Second Chance." And that film starts out demonstrating the explosive force of a multi-piece rim, something which is not in issue, but it does that for purposes of warning.

And so Goodyear produced an instructional film which showed how to maintain, and it did this after the Bob Smith memo, and it did this because it was a concerned enough company to go out in the field and investigate the poor practices that some people were following.

So before Mr. Hodder's accident, and this will be in evidence, Your Honor, Goodyear employees themselves traveled the country and you will see where they traveled

into Minnesota and Northern Minnesota, distributing the Goodyear film, distributing Goodyear warning literature of the type you've seen. * * *

* * *

[964] One of the aspects of this trial, is it becomes relevant, and any of these documents become relevant depending on the Court's rulings, will be to show the really massive efforts that Goodyear and the industry made throughout the 70's in the distribution of warning literature, in contacting trade publications to have them print safety information, and going to conferences and actually speaking and contacting the tire rim servicemen, and actually sending people out to the country to tire rim servicemen at the place of their employment. These were on-going safety campaigns that were increased and conducted on a year-by-year basis by Goodyear throughout the 70's and 80's up to today. The reason why they approached this safety campaign and not removing a rim from the field is that the accident again doesn't relate to the rim; it relates to training the tire rim serviceman.

* * *

[967] He talks about education and sales campaign. Those were done. It talks about DOT. What can DOT do? That's in the middle of the page. I've already told you within months after this memo was written the chief design engineer, Gerhart Gerbeth, was elected by DOT and by his peers to design safety literature that the government would distribute and which Goodyear would help distribute. That was done in 1974 and it was done in 1975, and it's done today. It's done every year. It's done continuously. It's done in a fashion which would reach every place that can reasonably be reached by mailing cam-

paigns and finding addresses where people can receive this literature.

* * *

[1587] * * * Anybody in this world that has anything at all to do with rims knows that if you do something that causes an accident with a rim that it can result in a very serious injury or death, because there is a tremendous amount of explosive energy in the tire. It's nothing that Goodyear denies. In fact, in 1976, they asked the government to find that it was hazardous. There were warning posters. I showed you. They're graphic. Goodyear warns about it. It's nothing that's been hidden. In fact, it's just the opposite. The industry has publicized.

* * *

[8847] MR. HENDRICKS: And we think that the law is that we can meet our duty to warn by showing reasonable efforts. That's the test. Therefore, that applies both to plaintiff and the employer, absolutely and without any question. That seems to me is clear law.

* * *

[12,873] The plaintiff has been arguing throughout this case that there is a continuing duty to warn, * * *

* * *

[14,043] Clear and convincing evidence means that the evidence must lead you to conclude that it is highly probable that Goodyear acted with willful indifference to the rights or safety of others. Put another way, the evidence must produce in your minds a firm belief or conviction that Goodyear acted in willful indifference to the rights or safety of others.

* * *

APPENDIX M

EVIDENCE OF WORTH

* * *

[6264] THE COURT: * * * The record has been made and the document will be received. You may read what portions you want to read, Mr. Risjord.

MR. RISJORD: From page 26, Your Honor.

THE COURT: What's the exhibit number there that we are dealing with?

MR. RISJORD: This is 172.

THE COURT: Thank you.

* * *

[6265] MR. RISJORD: The net sales of Goodyear Tire & Rubber Company for the year ending December 31, 1985, nine billion, five hundred eighty-five point one million dollars.

Total income, nine billion, seven hundred thirty point three million dollars.

Net income, four hundred twelve million four hundred thousand dollars.

The assets as of December 31, 1985, six billion, nine hundred fifty-three point 5 million dollars.

* * *

APPENDIX N

TESTIMONY OF PHILIP ROSENBERGER

* * *

Direct Examination by Goodyear

[8595] Q. During the time you have been at Aviso, have you ever done any work for Motor Wheel? A. Yes. I joined the company somewhere around 1963 and within a couple of years I was assigned to the Motor Wheel account, which at that time was around 1966. I was working as an assistant account executive and shortly after that I became the account executive on the Motor Wheel account.

[8596] Q. And have you been in charge of the Motor Wheel account since that time? A. I've been in charge of it since that period of time.

Q. Okay. A. Currently my current position on the account is the account supervisor on the account.

Q. Okay. Have you been involved in developing and distributing advertising for Motor Wheel? A. I've been involved in all of their formalized marketing communications, which includes areas of the passenger car area. It included area in terms of the off-highway marketplace that they are into, into the truck area. I've been involved in their safety programs. I have done other internal communication program for Motor Wheel as well.

* * *

[8601] Q. Does Aviso put in more man hours per year on safety and warning efforts for Motor Wheel, or on pure product advertising for Motor Wheel? A. In terms of numbers of man hours, the company would put in more man hours into the safety programs just because of all the details and things that are involved in the program in safety.

* * *

[8610] Q. Now, in the course of handling for Motor Wheel it's both product advertising and safety and warning efforts, have you familiarized yourself with the safety and warning efforts of other entities and organizations concerning truck rims? A. Yes, I have. When I first got very deeply involved in the safety program, and, like I say, that was back [8611] in the early 70's, I got on the mailing lists of the associations such as the National Wheel and Rim Association and the Rubber Manufacturers Association. I also have done contact with several manufacturers to find out what they were doing in the area of safety and warning materials. I have even contacted and talked with the original equipment manufacturers in terms of, you know, what they are doing and put out and what they will put out.

At that point in time we found that very little was done in terms of material that we could find out there in the field. Like I say, that was ten or twelve years ago that that took place.

Q. Have you familiarized yourself with the efforts that Goodyear made out of Akron? A. Yes, I have.

* * *

[8613] Q. In the course of familiarizing yourself with Goodyear's efforts out of Akron, have you reviewed Goodyear documents concerning efforts they have undertaken in the warning and safety area? A. Well, let's go back a little bit. All the time that I've been with the company we have had the Motor Wheel account. Like I say, in 1964, Motor Wheel became a wholly owned subsidiary of Goodyear. At that point in time we started working just shortly after that with Goodyear Metal Products Division, which was the division that was making the specific rims for both flat base and drop center.

We had been involved with Motor Wheel which made the wheel portion of the product line, where they weld the disc into the center of the rim. But at that point in time we took over the whole line of wheels and rims and were handling their communications on those.

They sent us up absolutely boxes full of both photograph material, old warning material, old application catalogs, every conceivable thing you can imagine. There was something like 12 or 14 boxes of different material that came up for my review.

* * *

[8634] Q. Mr. Rosenberger, in the course of handling the safety and warning efforts on the Motor Wheel account, have you familiarized yourself with efforts undertaken by the RMA, the Rubber Manufacturers Association? A. Yes, I have. We got involved with the Rubber Manufacturers by securing a number of their materials and actually getting quantities of them and putting them in our warehouse and distributing them in the early portion of the program that I have referred to earlier.

Later on, we stopped the actual distribution of those materials ourselves, but referred people who would inquire about those materials that were available from that particular association, we would refer them to the association with name, address, so that they secure them direct from the association rather than using us as a distribution of that particular effort as well.

Q. And Goodyear is a member of RMA? A. Yes.

Q. Have you familiarized yourself in handling the safety and warning efforts in the Motor Wheel account with efforts undertaken by the National Wheel and Rim Association? A. Yes, I have. Likewise, with the National Wheel Rim and [8635] Wheel Association, they put out materials that we also distributed and then later on made people aware of, where they could get the materials direct from the National Rim and Wheel Association.

I might mention that a lot of the materials I'm talking about how in regards to layout, graphic layout, and photographs and this kind of stuff that is in those other materials, including material from OSHA which was provided by Motor Wheel, Goodyear through us -

Q. So I understand this, you worked with the NWRA, the RMA, OSHA, for instance, in providing pictures, language - A. Yes. We actually provided them in some cases with just photographic material of step by step processes involved.

In other instances we would provide them with a complete keyline. * * *

* * *

[8636] Q. Do I understand then on the NWRA rim and wheel manual, Goodyear Exhibit 253, the section there

is simply the Goodyear-Motor Wheel safety manual put in a publication? A. This is a manual picked out of our safety materials and picked up almost exactly in most cases here in which they printed it in their particular publication along with the various other manufacturers in this particular piece. The OSHA regulation is also in this [8637] particular piece. We worked with the people at National Rim and Wheel when this piece was first under consideration through Motor Wheel, Bob Alcenius, who at the time was handling all the cataloging materials.

* * *

[8639] Q. Do you recognize Exhibit 209 as Goodyear-Motor Wheel publication? A. Yes, I do.

Q. Was your company involved in developing, formulating and publishing that exhibit? A. We were.

Q. Would you tell me what the date is of that Goodyear Exhibit 209? A. March, 1977.

Q. How was Goodyear Exhibit 209 distributed? A. We made this document available through our warehouse distributors. We actually sent it to the warehouse distributors including all of the sales people, principals, all the different locations. We made it available through truck dealerships and we made it available through our field engineers. Also on this particular piece I'm sure it was sent to Goodyear.

We were sending material that we would produce to the Goodyear people down there and keeping in touch with them on what they were doing in their [8640] programs as well.

* * *

[8644] Q. And what is the date on Goodyear Exhibit 39? A. 1973.

Q. And what is the date on Goodyear Exhibit 40? A. 1975.

Q. Okay. Does Goodyear Exhibit 39 and Goodyear Exhibit 40 have within them information concerning safety and instructions on handling rims, both single-piece and multi-piece rims? A. Both of these cover our complete line of rims, the single-piece and the multi-piece rims. And again, the material that's in here was supplied by Motor Wheel through us.

* * *

[8668] Q. Mr. Rosenberger, we left off yesterday talking about Goodyear's warning and safety efforts and their contacts and efforts through organizations such as the RMA, NWRA, and the DOT. I would like to pick up there again this morning. A. All right.

Q. I would like to show you what has been identified as Goodyear Exhibit 111 and Goodyear Exhibit 112. I ask you if you have ever seen Exhibits 111 and 112 before? A. I have seen both of these before.

Q. Are you familiar with those two exhibits? A. I am familiar with them.

Q. Are those safety and warning posters put out by the Department of Transportation? A. They are, both of them.

[8669] Q. Do you know approximately what time period of time frame those posters were first put out? A. These were put out in the mid to late 70's.

* * *

[8675] Q. Mr. Rosenberger, did the distribution of Goodyear Exhibits 111 and 112 continue throughout the 1970's, or was it just a one-shot deal? [8676] A. We had copies of those posters in our warehouse when we sent them out through the 1970's.

* * *

[8686] Q. Okay. Did you, with Mr. Bain, undertake a safety [8687] campaign for Motor Wheel? A. Yes, we did.

Q. Okay. Approximately when was that undertaken? A. That was in the early '70s.

Q. All right. A. It had—it had started under Mr. Spacke a little bit where we were doing various things in regard to safety, and it was—it was expanded and developed further under Mr. Bain.

Q. And had there been safety efforts prior to the formalized safety campaign? A. Yes. We had—as long as I can remember and had been on the account, we had always printed the mounting and demounting information and safety warnings and instructions in the backs of the application catalog, both all the catalogs on highway rims and off-highway rims, and we had printed the shop manuals on mounting and demounting, which also included safety and instructional material. We had done posters prior to that time.

Q. Okay. And we know there was distribution of the DOT posters, for instance, in 1973? A. Correct.

* * *

[8691] Q. Okay, and what is Goodyear Exhibit 202? A. Exhibit 202 is a bulletin put out by Mr. Landis Fields.

who was at that time the after-market manager. His job was to deal with the distributors, and he's announcing in this particular memo a rim safety exchange program to the distributors.

Q. Okay, is there a date on Goodyear Exhibit 202? A. It's November 1, 1977.

* * *

[8700] Q. Now, I show you what's identified as Goodyear Exhibit 172 and ask you to please identify that document for me. A. I can identify this. This is safety and warnings and instructions on rim and wheel handling.

[8701] Q. Okay, and was that publication prepared by your company? A. It was prepared by our company and it covered multi-piece and single piece rims.

Q. Okay, and what is the date of Goodyear Exhibit 172? A. The date on that is 1975.

Q. Okay, and was that prepared and distributed as part of Goodyear/Motor Wheel's warning and safety efforts concerning truck rims? A. Yes, this material was sent out to people. It was handed out at trade shows, it was given to truck dealers, and it was given to warehouse distributors. It went through—copies went to Goodyear for use in their program.

* * *

[8704] Q. Now, on Page 4 of Exhibit 172, Pages 4 and 5, are there photographs on those pages accompanying the instructions and warnings concerning the K-type rims? A. Yes, there are K-type rim photographs and copies with information on the correct and incorrect assemblies.

* * *

[8709] Q. Would you tell me, how many charts are there there? A. There are four charts here.

Q. Okay. And would you tell me what type of rim each chart deals with there? A. One chart deals with the mounting and demounting of Goodyear two piece and flat base semi drop center rims, and then it gives the types.

Another chart deals with how to properly mount and demount Goodyear three piece flat base rims.

Another chart deals with how to properly mount and demount Goodyear KB and KW type rims. Another one deals with how to properly mount and demount Goodyear drop center and super single rims.

Q. I show you what has been identified as Goodyear Exhibit 53 and Goodyear Exhibit 55. Would you identify those for the jury, please, Mr. Rosenberger? [8710] A. These are two of the posters that were in that exhibit, I think it was Exhibit 50.

Q. Okay. And Exhibit 55 deals with what type of rim? A. Exhibit 55 deals with single piece rims, the truck type and the super single type.

Q. Okay. So you had a separate poster for warning and instructions and safety on single piece rims? A. We had done all the posters at one time, but there was a separate poster for each type, basic type of rim.

Q. Okay. And Exhibit 53 concerns what kind of rim? A. 53 concerns the K, KW rim.

Q. And what is date on Exhibit 55, if it has one? A. 55 is 1971.

Q. And the date on Exhibit 53? A. 53 is 1971.

* * *

[8713] Q. As part of your continuing efforts, did you consolidate the five or four wall charts into a single one? A. Yes, we tried to put all the material that was on the five charts into a single wall chart.

Q. Okay. Let me show you what's been received as Goodyear Exhibit 217, and tell me if this is an example of how you handled each type of rim on one poster? A. Yes, that's an example of how we handled it on one poster.

* * *

[8717] Q. Who determines what is said in the safety warning, and instructional literature? A. The content of the warning literature comes from Motor Wheel/Goodyear. It also has our input into the thing with what we see in field practices.

Q. Do you work with engineer at Motor Wheel/Goodyear to determine the content of the literature?

[8718] MR. RISJORD: Are we speaking about the relevant time here or currently?

BY MR. MAY:

Q. In the last fifteen years, Mr. Rosenberger, have you worked with engineers at— A. (Interposing) In the times that I've worked with them, Motor Wheel's marketing communications people consult with all the engineering folks at Motor Wheel.

* * *

[8722] Q. Mr. Rosenberger, the various pieces of literature that we have here, is there a constant stream of this information that's distributed? A. We are developing information constantly and we are constantly mailing

material out and distributing the material. It goes on literally daily.

* * *

[8726] The after market side of the business, which is the replacement side of the business, when products get bent, damaged, broken, worn out, the distributor side of the business sells a new product to that end user out there and we call that the replacement or after market side of the business, and about 10 percent of the product goes through there. These people are out there dealing at a level in which the product is being worked on or replaced, and so our safety and handling and warning information has to get out to these channels as well.

* * *

[8931] Q. So we're clear, Mr. Rosenberger, Exhibit 113 would indicate where in Minnesota these two posters were distributed in the early '70s (indicating)? A. Yes.

* * *

[8970] Q. If I may, Goodyear Exhibit 277, Mr. Rosenberger, the computer printout, how is this exhibit represented on Goodyear Exhibit 721? A. The locations that are on there are the records that we had prior to December of 1981 where we made shipments of the safety kit, and they are indicated by the red flags up there on the map.

* * *

Cross Examination

[9042] Q. * * * Do you agree that if a product is dangerous, it should be accompanied by warnings and instructions about the dangers? A. People should be

given information on a product on how to properly use that product, and they should be given those instructions and warnings.

* * *

[9106] Q. But you did work on the safety exchange program, didn't you? A. I was involved in preparing a folder and communications information on that.

Q. Well, if the last KWX rim was made in 1958, you would agree that every single KWX out there was eligible in 1977, 19 years later, to be exchanged? A. Again, I'm not aware of the specific dates. I don't know on numbers of years.

Q. I want you to assume, because the jury knows this from testimony, that the last KWX was made in 1958. A. All right.

Q. It would therefore, assuming that was true, be eligible for your program, wouldn't it? A. It would have been eligible.

Q. All of them would have been, all KWX? A. They would have been eligible.

* * *

[9107] Q. * * * But you agree that it was an attempt to exchange the rim types described for safety? A. It was an attempt to get older rims out of service.

Q. For safety reasons, right? A. For safety reasons.

* * *

[9117] Q. So it's the practice of Motor Wheel to encourage the sale from the distributor's shelf or what-

ever of K rims, and at the same time you are attempting to remove them from the road for safety? A. No. We have an obligation to put into our catalogs, we have an obligation to tell people how to use those rims and how to mount and demount those rims, because once we have sold the rim to a distributor or on an International truck or something else and it runs 150,000 miles or five years or ten years, we have an obligation to continue to tell them how to use it.

* * *

[9163] Q. * * * [W]as the safety exchange program in its effort to get exchange of K rims, among others, successful? A. To my recollection, the exchange program - not just to exchange K rims but to exchange all multi-piece rims - did not achieve the results that we had hoped that it would achieve in terms of pulling old rims that [9164] should not be used out of service.

* * *

Q. The result is that it was a spectacular flop or failure. Isn't that correct? A. That is as I understand it.

Q. No rims were exchanged? A. I don't know if there were none.

Q. You don't know if there was one? A. I have - I've heard, like, four, but I - I don't know that.

Q. Four total rims in the United States of America and Canada. Right? A. Yes.

* * *

[9185] Q. The question of these things exploding and killing people and your client claiming that that is because they are uninformed, that is not a long-term

problem? A. Well, we have taken the attitude in terms of the material that we have done--we haven't taken a haphazard, one-time approach of getting on TV or anything like that as a one-time approach. We have taken it as a long-term obligation that we have been doing year after year, day after day. It is a continuous educational process on warning and instructing.

* * *

[9247] Q. Do you agree that in the year 2000 there will still be young men, particularly, and young people that get injured and killed by Goodyear K rims, if the company that you work for continues along its present course? A. On any rims or any wheels, if they are not properly maintained or they are cracked or anything is wrong with them, if they can't recognize the danger signs, I am aware of the fact that there can be accidents.

Q. And there will continue to be on the basis of the [9248] present course of conduct? A. That's why it makes it more imperative that we continue to do what we are doing right now in terms of instructing and including all of this information in what we are doing.

* * *

[9252] Q. * * * Now, we have a problem I want you to help us with because we don't know what a key word in this sentence is, so I'm going to repeat it to you and then I'm going to ask you about it; all right?

"This proposed OSHA standard is the result of industry (wheel manufacturers) pressure on OSHA to promulgate a standard which will put the product liability onus on the people who service multi-piece rims wheels and hopefully minimize the manufacturers' exposure to

product liability claims and actions arising out of multi-piece rim wheel failures and explosions resulting from improper servicing procedures."

Now, would you define the word "onus" for the jury? We're having trouble determining what that word means.

* * *

[9254] Q. Okay. Well, now identify for the jury and define for it the word "onus," o-n-o-s, what does that mean? * * *

BY MR. FLASKAMP:

Q. O-n-u-s. A. They are trying to put the responsibility on somebody else.

* * *

Recross Examination

[9333] Q. Well, whatever you want to call it, the documents that were prepared in 1979 to bring back in from people in the field back into the manufacturer, what do you call that? A. That was an exchange program.

Q. Exchange program. And you exchanged four rims with that program? A. I don't recall the specific number. I was not involved in the actual numbers. All I've heard is a very small number.

Q. I thought you said yesterday there were four rims that— A. Yes, four.

Q. Didn't you say that yesterday? A. That was the number I heard. I know that it was not successful in bringing in large quantities of rims.

* * *

APPENDIX O

TESTIMONY OF DONALD LEE WHITE

* * *

Direct Examination by Goodyear

[8412] Q. How did you learn your territory? When did you start your job and how did you learn the customers that were on that route? A. I started in September of 1974, and the man that had the territory before me was on there for 32 years, I believe it was, and I trained with him for four months.

Q. What was the reason for training with him during that period? A. To establish the territory and basically learn the product line and how things were done with—with our products.

[8413] Q. In your job responsibilities do you receive, or has Pioneer received warning or safety literature from Motor Wheel Corporation? A. Yes.

Q. Do you distribute that warning literature to your customers? A. Yes.

Q. What is the reason for doing that? A. Awareness of - of multi-piece rims, the mounting procedures on the charts, mounting and dismounting, I should say.

* * *

[8414] Q. Are Goodyear Exhibits 281 and 282 the types of literature which in December of 1981 or before you would have distributed to your customers? A. Yes.

Q. Do you distribute this safety literature in the normal course of your duties and responsibilities as a sales person for Pioneer Rim and Wheel? A. Yes.

* * *

[8415] MR. DOBBELS: Your Honor, at this time we would introduce into evidence Goodyear Exhibits 281 and 282.

MR. GODLEWSKI: I have no objection. I'd just like to know the dates of 281 and 282, if I may.

THE WITNESS: 1981 and 1980.

* * *

MR. FLASKAMP: Mr. White, did you ever deliver any of those catalogs to Remer Oil Company in the years of their - of their publication?

THE WITNESS: No, not that I'm aware of.

* * *

[8419] BY MR. DOBBELS:

Q. Mr. White, let me show you what has been marked as Goodyear Exhibit 217 and ask you if you recognize both the package and the material contained within it? A. Yes, I do.

Q. Could you identify what that is, Mr. White, for the record? A. This is a safety manual which contains the mounting procedures and safety material, reading material.

[8420] And this is a safety chart (indicating).

Do you want me to open it up?

Q. Why don't you look in it and see if you recognize it. I'll give you a hand in opening it. A. Yes, I recognize it.

Q. Okay. Could you please tell us briefly if you recognize having distributed these to your customers before December of 1981? A. Yes.

Q. Did you make these available to all of your customers? A. Yes.

* * *

BY MR. GODLEWSKI:

Q. Mr. White, did you ever drop any information that's part of the packet that is contained in Goodyear Exhibit 217 at Remer Oil Company, Remer, Minnesota?

* * *

THE WITNESS: No.

MR. GODLEKSKI: You never did?

[8421] THE WITNESS: No.

* * *

Cross Examination

[8451] Q. That safety information you have in front of you is generated by Motor Wheel Corporation, is it not? A. Yes.

Q. And you understand that to be a subsidiary of the Goodyear Tire and Rubber Company. A. Yes.

Q. Now, all that information first comes to Pioneer in Minnesota, is that correct? [8452] A. Yes.

Q. And then from Pioneer, your employer, it's given to the salesmen, one of whom is yourself, correct? A. Yes.

Q. So the origin and the - if we could draw a flow sheet it would be Motor Wheel to Pioneer, correct? A. Yes.

Q. And Pioneer to Don White? A. Yes.

Q. And then Don White to Don White's customers, or really Pioneer's customers? A. Pioneer's, yes.

Q. Now, what does it take to become a customer of Pioneer? A. Pioneer Rim and Wheel customers - the territory that I took over - there was established customers.

Q. This is 1974, correct? A. Yes.

* * *

[8456] Q. Your daily log sheets do not reflect that you ever dropped off any safety information at the Remer Oil Company, Dale Zorman's place of business in Remer, Minnesota; is that correct? A. Yes.

Q. We are talking about the relevant time period 1974 to 1981. A. Yes.

* * *

[8461] Q. Mr. White, I'm showing you what has been marked Plaintiff's Exhibit 3.1 and ask you whether or not you have a recollection of that being a gas station in Remer, Minnesota. Take a look at it. A. Could be.

[8462] Q. You see a service bay area door there, do you not? A. Yes.

Q. And there are some tires there also? A. Yes.

Q. Would this be a station that you would consider dropping off that safety information so it could get to employees servicing rims and wheels? A. No.

Q. Do you know how many service stations were in Remer, Minnesota, during 1974 to 1981? A. No.

* * *

Redirect Examination by Goodyear

[8475] Q. Are you familiar with a tire dealer that goes by the name of Itasca? A. Yes.

Q. Could you please tell me who that is? A. Itasca Tire is in Grand Rapids. They had also outside [8476] salesmen.

Q. Are they presently in existence? A. No.

Q. Were they in operation prior to 1981? A. Yes.

Q. Prior to 1981 had you delivered safety information to them? A. Yes.

* * *

Recross Examination

[8480] Q. Now, when you were driving through your territory in northern Minnesota, would you have occasion to see - I'm talking about the relevant time period here, 1974 to 1981. A. Yes.

Q. All right. You would have occasion to see, would you [8481] not, used K rims for sale? A. Well, your tire dealers have them for sale, yes.

Q. And these - by K rims, I'm referring to Plaintiff's Exhibit 1 [the Goodyear KWX truck rim which injured Dale Hodder] as an example, that is a split base rim. You recognize this as a Goodyear K rim? A. Yes.

Q. And you would see these for sale in tire shops in your area during the period of 1974 to 1981; correct? A. Yes.

Q. Would you drop off any of the safety information that you in front of you to all the shops that you saw selling these used K rims? A. Not necessarily.

* * *

APPENDIX P

CLOSING STATEMENT OF GOODYEAR COUNSEL

* * *

[13,794] I submit to you that there's been no failure of any warning in this case, no failure to warn because the warnings were there in the trade magazines, the warnings were there at Pioneer, and if Mr. Zorman had not dealt in junk parts that he found after the snow melted, if he bought parts, good parts that were serviceable parts, he would have gotten the warnings directly from the distributor also.

There's no failure to warn in this case because Dale Zorman ignored and said he would ignore what warnings were made available to him.

Now, let me go first to punitive damages in this case, and this is not a punitive damage case. [13,795] You're going to see in the instructions that punitive damages must be based upon clear and convincing evidence.

You're going to get a packet of instructions which is thicker than the verdict you have now in front of you. Clear and convincing evidence. There's a high standard of proof for punitive damages. It means that you have to have a firm conviction, a firm belief that Goodyear acted in willful indifference to the rights and safety of people like Dale Hodder in 1955 when it produced this rim, and there's clearly no evidence of that.

Goodyear has done everything it could do to make a good product, a tested product, a product that was absolutely safe if used correctly. Gerbeth has served on government committees, Goodyear has gone to OSHA. By the way, NHTSA went to OSHA, too, after investigating these rims and what was causing these accidents.

Goodyear got an OSHA standard passed that reduced the accident rate in this country 70 to 80 percent, 70 to 80 percent after the passage of the OSHA standard.

Goodyear has put out warning literature, [13,796] put out instructions, made safety films, shown and distributed in the State of Minnesota. There is no evidence of willful disregard of people's rights.

You know, a manufacturer can't control each and every workplace in this country, and there's a hundred thousand workplaces in this country. We can't hire and fire, we can't be responsible for training Dale Hodder, we can't be there every time a part time high school student is hired, 17 years old, to work in what Dale Zorman knew could be a dangerous occupation if you don't do it correctly. You can't be there.

That's why we saw to it that our government, federal government passed the OSHA standard, so that employers will have the obligation to train, something that Goodyear can't do.

You know, one point in Mr. Youngdahl's testimony, he tells you that training is the key. I asked him, "Now have you come across in your research findings by the federal government that proper training is the key to preventing accidents with truck rims?"

"Answer: I've read statements to that effect."

* * *

APPENDIX Q

(Filed July 25, 1986)

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

File No. 793068 N

Dale L. Hodder,
Plaintiff,

vs.

The Goodyear Tire & Rubber Company, an Ohio corporation, and Motor Wheel Corporation, an Ohio corporation,
Defendants,

and

The Goodyear Tire & Rubber Company, an Ohio corporation, and Motor Wheel Corporation, an Ohio corporation,
Defendants and Third-Party Plaintiffs,

vs.

Remer Oil Company, Inc., a Minnesota corporation,
Third-Party Defendant.

SPECIAL VERDICT

1. Was the KWX truck rim defective and unreasonably dangerous because of its design?

ANSWER: Yes ____ No X

2. If your answer to question 1 was "yes," then answer this question:

Was such a defective and unreasonably dangerous design a direct cause of Dale Hodder's injuries?

ANSWER: Yes ..... No .....

3. Was the Goodyear Tire & Rubber Company negligent because it knew or reasonably could have discovered the danger involved in the use of the KWX truck rim, and the KWX truck rim was not accompanied by adequate warnings?

ANSWER: Yes X No .....

4. If your answer to question 3 was "yes," then answer this question:

Was the Goodyear Tire & Rubber Company's negligence a direct cause of Dale Hodder's injuries?

ANSWER: Yes X No .....

5. Was Motor Wheel Corporation negligent because it knew or reasonably could have discovered the danger involved in the use of the KWX truck rim, and the KWX truck rim was not accompanied by adequate warnings?

ANSWER: Yes X No .....

6. If your answer to question 5 was "yes," then answer this question:

Was Motor Wheel Corporation's negligence a direct cause of Dale Hodder's injuries?

ANSWER: Yes X No .....

7. Was Remer Oil Company, Inc. negligent?

ANSWER: Yes X No .....

8. If your answer to question 7 was "yes," then answer this question:

Was Remer Oil Company, Inc.'s negligence a direct cause of Dale Hodder's injuries?

ANSWER: Yes X No .....

9. Was Dale Hodder negligent?

ANSWER: Yes ..... No X

10. If your answer to question 9 was "yes," then answer this question:

Was Dale Hodder's negligence a direct cause of his injuries?

ANSWER: Yes ..... No .....

11. If your answer was yes to questions 2, 4, 6, 8 or 10, then as to those questions that you answered "yes," answer the following:

Taking all of the fault that directly caused Dale Hodder's injuries as 100%, what percentage of fault do you attribute to each of the following:

ANSWER:

a) The Goodyear Tire & Rubber Company	42.5%
b) Motor Wheel Corporation	42.5%
c) Remer Oil Company, Inc.	15.0%
d) Dale Hodder	0.0%
Total:	100%

REGARDLESS OF HOW YOU ANSWERED QUESTIONS 1 THROUGH 11, YOU *MUST* ANSWER QUESTION 12:

12. What sum of money will fairly compensate Dale Hodder for his injuries?

Past:

Pain	$ 25,000.00
Disability	$ 750,000.00
Disfigurement	$ 100,000.00
Embarrassment	$ 50,000.00
Emotional Distress	$ 75,000.00
Past expenses for care and treatment	$ 147,463.00
Loss of earnings	$ 60,000.00

Future:

Pain	$ 10,000.00
Disability	$ 175,000.00
Disfigurement	$ 30,000.00
Embarrassment	$ 15,000.00
Emotional Distress	$ 20,000.00
Costs of live-in attendants, medical and dental treatment, rehabilitation, occupational, recreational, and physical therapies, psychological and family counseling, cognitive retraining, and behavioral remediation, medication and clinical testing, and similar expenses	$1,091,453.00

Loss of earnings ..... $ 820,000.00

Total Past and Future $3,368,916.00

13. Is Dale Hodder entitled to an award of punitive damages from Goodyear?

ANSWER: Yes X No .....

14 If your answer to question 13 was "yes," then answer this question:

Amount of punitive damages: $12,500,000.00

15. Had the useful life of the KWX truck rim expired at the time of Dale Hodder's injuries?

ANSWER: Yes X No .....

16. If your answer to question 15 was "yes," then answer this question:

Was Dale Hodder negligent for failing to determine that the useful life of the KWX truck rim had expired?

ANSWER: Yes ..... No X

17. If your answer to question 16 was "yes," then answer this question:

Was the negligence of Dale Hodder in failing to determine that the useful life of the KWX truck rim had expired a direct cause of his injuries?

ANSWER: Yes ..... No .....

Signed: /s/ Warren W. Thompson
Foreperson

DATED: July 25, 1986.

IF FIVE-SIXTHS VERDICT, CONCURRING JURORS SIGN ON THE LINES NUMBERED BELOW:

1. ..... 4. .....

2. ..... 5. .....

3. .....

This Section To Be Completed by Court Clerk.

Jury Retires at 11:25 o'clock A.M., July 23, 1986.

Verdict Rendered at 3:33 o'clock P.M., July 25, 1986.

Filed: July 25, 1986.

By: /s/ John T. Richardson
Deputy Clerk

APPENDIX R

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Richard S. Slowes, being first duly sworn on oath, deposes and states as follows:

1. I am an attorney at law licensed to practice in Minnesota and am an Assistant Solicitor General for the State of Minnesota. From 1980 Until January of 1988, my duties and responsibilities included receiving and reviewing notices on behalf of the Attorney General when parties and lawyers challenge the constitutionality of an act of the legislature in any action to which this state or an officer, agency or employee of the state is not a party pursuant to Minn. R. Civ. P. 24.04, and Minn. R. App. P. 144.

2. I have reviewed all records of such notices in the Attorney General's office concerning *Dale L. Hodder v. The Goodyear Tire & Rubber Company, et al.* Hennepin County File No. PI 793-068; Appellate Court Nos. C3-87-419 and C2-87-511.

3. My review of the above-mentioned files included a search for all notices of constitutional challenges pursuant to Minn. R. Civ. P. 24.04 and Minn. R. App. P. 144, by or on behalf of all parties to this case.

4. The Attorney General's records do not reflect receipt of any notice of constitutional challenges by Defendants/Appellants Goodyear and Motor Wheel at the trial court level.

5. The only notice putting the constitutionality of any statute in issue by Defendants/Appellants Goodyear and Motor Wheel was at the appellate court level pursuant to Minn. R. App. P. 144. A copy of that notice is attached hereto and made a part hereof.

6. Affiant has read this Affidavit and believes it to be true to the best of his knowledge.

FURTHER YOUR AFFIANT SAITH NOT.

s/ Richard S. Slowes
Richard S. Slowes
Assistant Solicitor General
State of Minnesota

Subscribed and sworn to before me this 18th day of May, 1988.

/s/ Barbara Grimes
Notary Public

(Seal)

STATE OF MINNESOTA
IN COURT OF APPEALS

Trial Court Case No. 793068
Appellate Court Case No. C3-87-419

Dale L. Hodder,
Respondent,

v.

The Goodyear Tire & Rubber Company,
and Motor Wheel Corporation,
Appellants,

v.

Remer Oil Company, Inc.,
Respondent.

NOTICE TO ATTORNEY GENERAL PURSUANT TO RULE 144 M. R. CIV. APP. P.

TO: Hubert H. Humphrey, III, Attorney General, State of Minnesota and Richard S. Slowes, Assistant Solicitor General, State of Minnesota, 515 Transportation Bldg., St. Paul, Minnesota 55155.

PLEASE TAKE NOTICE that on March 5, 1987, the Goodyear Tire & Rubber Company ("Goodyear") and Motor Wheel Corporation ("Motor Wheel") filed their Joint Notice of Appeal from a Judgment entered February 10, 1987, and an Order filed February 2, 1987, on which written notice of filing was served February 3, 1987. Also please note that on March 13, 1987, Goodyear and Motor Wheel filed their Joint Petition for Accelerated Review to the Supreme Court.

PLEASE TAKE FURTHER NOTICE that Appellants Goodyear and Motor Wheel intend to challenge the constitutionality of Minn. Stat. § 549.20 (1980) on its face and as it was applied by the trial court. The trial court's punitive damages instruction was premised on Minn. Stat. § 549.20 which explicitly allows punitive damages to be based on acts toward "others" (*i.e.* people other than Dale Hodder) in violation of the due process protections afforded by the Minnesota and United States Constitutions. The trial court applied Minn. Stat. § 549.20 in an unconstitutional manner in that punitive damages were allowed to be based on conduct unrelated to the underlying cause of action (*i.e.* not accompanying the 1955 KWX rim with a warning).

Dated: March 17, 1987

Dorsey & Whitney
By /s/ James B. Vessey
James B. Vessey (#112690)
Kelley R. Lorix (#145828)
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APPENDIX S

STATE OF MINNESOTA
IN SUPREME COURT

C3-87-419 and C2-87-511

Dale L. Hodder,
Respondent (C3-87-419),
Appellant (C2-87-511),

vs.

The Goodyear Tire & Rubber Company et al.,
defendants and third party plaintiffs,
Appellants (C3-87-419),
Respondents (C2-87-511),
Pioneer Rim & Wheel Company,
Respondent,
Remer Oil Company, Inc., third
party defendant,
Respondent,

and

Pioneer Rim & Wheel Company, defendant
and third party plaintiff,
Respondent,

vs.

Acheson Tire Company, third party
defendant,
Respondent,
Arrowhead Equipment Company,
third party defendant,
Respondent,
Itasca Tire Company, third
party defendant,
Respondent.

MEMORANDUM IN SUPPORT OF THE GOODYEAR TIRE & RUBBER COMPANY'S TAXATION OF COSTS

The Goodyear Tire and Rubber Company ("Goodyear") prevailed in its appeal of the judgment rendered in favor of Dale L. Hodder ("Hodder"). Rule 139 of the Minnesota Rules of Civil Appellate Procedure allows the prevailing party in an appeal to be reimbursed for its statutory costs and disbursements. An appellant prevails if he secures a reversal or modification of the judgment from which an appeal is taken. *Servin v. Servin*, 345 N.W.2d 754, 759 (Minn. 1984); *Village of Blaine v. Independent School District # 12, Anoka County*, 121 N.W.2d 183 (1963). Goodyear appealed the award of $12,500,000 in punitive damages to Hodder. The Supreme Court sustained Goodyear's appeal and reduced the punitive damages award to $4,000,000.00. Goodyear is thus the prevailing party.

As a prevailing party, Goodyear is clearly entitled to be reimbursed for its statutory costs and the cost ($30,000) of the $5,000,000 supersedeas bond that it was required to file.

* * *

Dated: May 23, 1988

Dorsey & Whitney
By /s/ Tim Branson
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Timothy E. Branson (#174713)
Frederick A. McNeill (#184561)
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Attorneys for The Goodyear Tire & Rubber Company and Motor Wheel Corporation

OF COUNSEL:

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APPENDIX T

Nos. C3-87-419 and C2-87-511

STATE OF MINNESOTA
IN SUPREME COURT

DALE L. HODDER,
Respondent (C3-87-419),
Appellant (C2-87-511),

vs.

THE GOODYEAR TIRE & RUBBER COMPANY
and MOTOR WHEEL CORPORATION,
Appellants (C3-87-419),
Respondents (C2-87-511),

vs.

REMER OIL COMPANY,
Respondent.

DALE L. HODDER'S ANSWER AND APPENDIX TO THE GOODYEAR TIRE & RUBBER COMPANY AND MOTOR WHEEL CORPORATION'S PETITIONS FOR REHEARING

* * *

ARGUMENT

I. THIS COURT WILL NOT CONSIDER ISSUES OR ARGUMENTS WHICH ARE RAISED FOR THE FIRST TIME IN A PETITION FOR REHEARING.

The rule governing the granting of rehearings in Minnesota was set down by this court in *Derby v. Gallup.*

5 Minn. 119 (1860), and later codified as Minn. R. App. P. 140.01. During the 120-year existence of this rule, the Minnesota Supreme Court has consistently held that an argument raised for the first time on petition for rehearing will not be considered. *Lentz v. Pearson*, 74 N.W.2d 662, 669-70 (Minn. 1956); *First National Bank of West Minneapolis v. Persall*, 125 N.W. 675 (Minn. 1910); *see also State v. Adams*, 89 N.W.2d 661 (Minn. 1958), *cert. denied*, 358 U.S. 826 (1958). In *Lentz*, this court denied a petition for rehearing stating: "[T]he points specified and relied upon in the petition for re-argument appear for the first time in said petition. The case was not tried below or argued in this court on that theory. The matter, therefore, is not properly before us." *Lentz*, 74 N.W.2d at 669-70. Only if a question decisive of the case and *duly submitted* has been overlooked by the court will there be grounds for a rehearing. *See Wurdemann v. Hjelm*, 110 N.W.2d 150, 151 (Minn. 1961).

Most of the issues and arguments raised by Goodyear/Motor Wheel in their Petitions for Rehearing were neither argued nor preserved at the trial court or appellate level.

II. GOODYEAR/MOTOR WHEEL FAILED TO GIVE PROPER AND TIMELY NOTICE TO THE ATTORNEY GENERAL AND FAILED TO RAISE AND PRESERVE CONSTITUTIONAL ISSUES BOTH AT THE TRIAL AND APPELLATE LEVELS AND MISAPPLIED THE SEVENTH AMENDMENT.

Goodyear/Motor Wheel is asking this Court to consider and rule upon issues which have not been properly preserved because they failed to raise them below or

because they failed to give timely and proper notice to the Attorney General of Minnesota pursuant to Minn. R. Civ. P. 24.04 and Minn. R. App. P. 144. Because these issues were not preserved, Dale Hodder asks this Court to acknowledge that these claims and arguments are untimely and are not properly before this Court.

A. Goodyear/Motor Wheel Failed To Give Timely And Proper Notice To The Attorney General Of The State Of Minnesota.

Goodyear/Motor Wheel may not question the constitutionality of the Minnesota Punitive Damages Statute, Minn. Stat. § 549.20 (1986), because they did not notify the Attorney General of their intention to do so at the trial court level pursuant to Minn. R. Civ. P. 24.04. A-1 to A-5. Minnesota Rule of Civil Procedure 24.04 provides:

> When the constitutionality of an act of the legislature is drawn in question in any action to which the state or an officer, agency or employee of the state is not a party, the party asserting the unconstitutionality of the act shall notify the attorney general thereof within such time as to afford him an opportunity to intervene.

Id.

Historically, this Court has been reluctant to consider the constitutionality of any state statute when proper notice has not been given to the Attorney General pursuant to Minn. R. Civ. P. 24.04. *Elwell v. County of Hennepin*, 221 N.W.2d 538, 545 (Minn. 1974); *see Hughes v. Patrick and Associates*, 220 N.W.2d 347, 348 (Minn.

1974) ("We dismiss the appeal for what we hold to be a failure to fully comply with the rules requiring notice to the attorney general in actions attacking the constitutionality of a statute . . . ."); *Johnson v. Village of Plymouth*, 180 N.W.2d 184, 185 (Minn. 1970) ("We do not reach the constitutional issues which were neither submitted to the trial court nor brought to the attention of the Attorney General under Rule 24.04, Rules of Civil Procedure."); *Campbell v. Glenwood Hills Hospitals, Inc.*, 142 N.W.2d 255, 260-61 (Minn. 1966) ("Minnesota Supreme Court refused to consider the constitutionality of statute because no notice had been given to attorney general pursuant to Minn. R. Civ. P. 24.04."); *In Re Leary's Appeal*, 136 N.W.2d 552, 560 (Minn. 1965) ("It was incumbent upon the appellant in this case, if she wished to raise the constitutionality of the statute, to serve the required notice upon the attorney general."); *Lowe v. Patterson*, 120 N.W.2d 313, 316 (Minn. 1963) ("The rules themselves require that all assignments challenging the constitutionality of statutes must be called to the attention of the Attorney General. Without such notice they may not be reviewed."); *Qualle v. County of Beltrami*, 420 N.W.2d 256, 258 (Minn. App. 1988) ("Appellant has not raised the issue in a timely manner. In addition, the attorney general should have been notified in writing prior to conclusion of the trial in order to allow the opportunity for the state to defend the statute's constitutionality.").

In *Elwell v. County of Hennepin*, 221 N.W.2d 538 (Minn. 1974) a county failed to serve notice upon the Attorney General of its claim that Minnesota's green acres statute was unconstitutional. Although the *Elwell*

court ultimately agreed to consider a constitutional question of which the attorney general had no notice, it did so because the issue had been specifically raised during the district court proceedings. *Elwell*, 221 N.W.2d at 545. "[T]he statute was argued by the parties in briefs submitted after the trial and was discussed at length in the trial court's memorandum." *Id.* at 542. Therefore, the question, having been considered by the trial court, was within the scope of the Supreme Court's review. *Id.*

The *Elwell* court noted that the "clear intent of the rule is to provide notice to the attorney general of an attack upon the constitutionality of a legislative act so that he may have the opportunity to defend its constitutionality." *Id.* at 544; *see In Re Leary's Appeal*, 136 N.W.2d 552, 560 (Minn. 1965); *Qualle v. County of Beltrami*, 420 N.W.2d 256, 258 (Minn.App. 1988). The *Elwell* court concluded that "because of the obvious salutary reasons for the rules, . . . we intend to require strict compliance with them and will ordinarily refuse to consider constitutional questions on appeal if there is a failure to give notice pursuant to the rules unless significant reasons appear for doing otherwise." *Id.* at 545.

Neither Goodyear nor Motor Wheel ever gave notice to Minnesota's Attorney General at the trial court level pursuant to Minn. R. Civ. P. 24.04. Attached at A-1 to A-5 is an Affidavit from Assistant Solicitor General Richard S. Slowes which verifies that he has reviewed the Hodder files in the Attorney General's Office and that there is no record of Goodyear/Motor Wheel ever having given notice at the trial court level of its intent to question the constitutionality of any Minnesota statute pursuant to Minn. R. Civ. P. 24.04. Goodyear/Motor

Wheel has offered no justification, for its failure to comply with Minnesota's Rules.[1]

The Minnesota Rules of Appellate Procedure have a parallel provision set forth in Rule 144. That Rule states:

> When the constitutionality of an act of the legislature is questioned in any appellate proceeding to which the state or an officer, agency or employee of the state is not a party, the party asserting the unconstitutionality of the act shall notify the attorney general within time to afford him an opportunity to intervene.

Id. "Notice must be served upon the attorney general pursuant to Minn. R. Civ. P. 24.04 *and* Minn. R. App. P. 144 when the constitutionality of an act of the legislature is questioned in any action to which the state is not a party." *McGuire v. C & L Restaurant Inc.*, 346 N.W.2d 605, 609 n.4 (Minn. 1984) (emphasis added). The only notice to the Attorney General given by Goodyear/Motor Wheel at the appellate level pursuant to Rule 144 is attached to and made part of the Affidavit of Richard S. Slowes. (A-4 to A-5.)

Goodyear/Motor Wheel's Rule 144 notice informs the Attorney General that Goodyear and Motor Wheel:

> [i]ntend to challenge the constitutionality of Minn. Stat. § 549.20 (1980) on its face and as it was applied by the trial court. The trial court's punitive damages instruction was premised on Minn. Stat.

---

1. The Affidavit merely confirms what the record in this case demonstrates—no notice to the Attorney General by Goodyear/Motor Wheel at the trial court level and only one specific issue at the appellate level.

§ 549.20 which explicitly allows punitive damages to be based on acts toward "others" (*i.e.* people other than Dale Hodder) in violation of the due process protections afforded by the Minnesota and United States Constitutions. The trial court applied Minn. Stat. § 549.20 in an unconstitutional manner in that punitive damages were allowed to be based on conduct unrelated to the underlying cause of action (*i.e.* not accompanying the 1955 KWX rim with a warning).

Goodyear and Motor Wheel's belated notice to the attorney general questions the "unconstitutional manner" in which the trial court applied the Punitive Damages Statute. Never do Goodyear and Motor Wheel raise the arguments they are now asserting that the statute is unconstitutionally vague, that it allows the imposition of unconstitutionally excessive fines, that it violates their rights to a trial by jury or that the statute, in and of itself, violates their rights to due process of the law. The only issue raised in Goodyear/Motor Wheel's untimely notice to the Attorney General is that the trial court's jury instruction on punitive damages was an unconstitutional application of the statute.

Further any notice given by Goodyear/Motor Wheel pursuant to Minn. R. App. P. 144 is invalid because of their failure to preserve the issues at the trial court level pursuant to Minn. R. Civ. P. 24.04.

B. Goodyear/Motor Wheel May Not Raise Constitutional Issues For The First Time In Their Petitions For Rehearing Which Have Not Been Properly Preserved Below.

Defendants Goodyear/Motor Wheel are asking this Court to consider constitutional issues which were either

not raised at all or were not adequately raised and preserved in the previous district and appellate court proceedings. In their Appellate Brief, the only constitutional cite is to Article I, § 10, the prohibition against *ex post facto* laws. In their Petitions for Rehearing, Defendant Goodyear cites five constitutional provisions and Defendant Motor Wheel cites two. While Defendants had ample opportunity to raise these additional constitutional arguments regarding punitive damages in their Answer, Amended Answer, during trial in their Motion for New Trial and in their Appellate and Reply Briefs, they did not do so. They now ask this Court to consider these new issues for the first time in their Petitions for Rehearing.

This Court has repeatedly held that it will not consider constitutional issues raised for the first time on appeal. *See Bianchi v. Nordby*, 409 N.W.2d 835, 839 (Minn. 1987); *Matter of Welfare of C.L.L.*, 310 N.W.2d 555, 557 (Minn. 1981); *Elwell v. County of Hennepin*, 221 N.W.2d at 542; *Johnson v. Village of Plymouth*, 180 N.W.2d 184, 185 (Minn. 1970).

Minnesota recognizes that failure to raise issues at the trial court level prevents development of a record for the appellate court to review. *State Bank of Morristown v. Labs*, 275 N.W.2d 37, 40 (Minn. 1979).

The unconstitutionality or "illegality" of a statute is an affirmative defense pursuant to Minn. R. Civ. P. 8.03. Failure to plead an affirmative defense, without later amendment of the pleading, waives the defense. *Rehberger v. Project Plumbing Co., Inc.*, 205 N.W.2d 126, 127 (Minn. 1973); *Nodland v. Chirpich*, 240 N.W.2d 513, 517 (Minn. 1976). Goodyear/Motor Wheel never asserted the

unconstitutionality of the Punitive Damages Statute as an affirmative defense in its Answer or Amended Answer and thereby waived their right to challenge the Punitive Damages Statute. The contention that a state statute is unconstitutional is an affirmative defense and must be so pleaded in the Answer. *Kewanee Oil & Gas Co. v. Mossmer,* 58 F.2d 711 (10th Cir. 1932).

In its Petitions for Rehearing, Defendants Goodyear/Motor Wheel raise several constitutional questions which were neither properly raised nor ruled upon in any of the previous proceedings in this case. Accordingly, Plaintiff Hodder asks this Court to acknowledge that the constitutional issues raised by Goodyear/Motor Wheel were not preserved below and are not properly before this Court.

C. The Seventh Amendment To The United States Constitution Does Not Apply To State Court Civil Actions.

In their Petitions for Rehearing, Goodyear/Motor Wheel misapply the Seventh Amendment to the United States Constitution. It is widely recognized in Minnesota and throughout the United States that the Seventh Amendment is a limitation on the federal government only and not on the states. That being true, it applies only to civil jury trials in the federal and not in state courts. *Carl v. De Toffol,* 25 N.W.2d 479 (Minn. 1946); *see Iacaponi v. New Amsterdam Casualty Company,* 258 F.Supp. 880, (W.D. Pa. 1966), *aff'd.* 379 F.2d 311 (3d Cir. 1967), *cert. denied,* 389 U.S. 1054 (1968). Accordingly, Goodyear/Motor Wheel has no right to a jury trial in this case based upon the Seventh Amendment to the United States Constitution.

* * *

II. THIS CASE WAS TRIED, DEFENDED AND SUBMITTED TO THE JURY ON THE CONTINUING DUTY TO WARN THEORY AND DID NOT VIOLATE GOODYEAR'S CONSTITUTIONAL RIGHTS.

Goodyear once again argues that the jury instruction concerning the duty to warn was invalid. This is not a proper subject in this Petition for Rehearing. This issue has been fully argued and briefed by the parties. Respondent Hodder's Brief at 23-28, 34-35. Goodyear and Motor Wheel's counsel recognized during the jury instruction conference that "Plaintiff has been arguing throughout this case that there is a continuing duty to warn . . . ." T. 12,873. Goodyear/Motor Wheel's motion for a directed verdict on the issue of continuing duty to warn was denied (T. 13,643), and the issue was submitted to the jury. T. 14,033-34.

Goodyear does not properly represent to this Court Hodder's position on JIG III 119 regarding Goodyear's duty to warn. Goodyear's counsel presents a quote from page 13,681 of the transcript regarding the warning question on the special verdict form as if it was a complete sentence, but omits the remainder of the sentence of Hodder's counsel's argument to the Court that JIG III 119 encompasses the continuing duty to warn theory upon which the case was tried:

> So we are not talking about a continuing duty to warn in the question, whereas I think the instruction is broad enough to include a continuing duty to warn.

T. 13,681.

The entire case on the warning issue was presented on the continuing duty theory by Hodder and was de-

fended on a continuing duty theory by Goodyear and Motor Wheel. Hodder claimed this in his Complaint, Amended Complaint, and in his Trial Brief. RA. 141-49, 175, 200. All of Goodyear's proof on the warning issue showed that its warning efforts occurred after 1955 when the KWX rim in question was manufactured. Goodyear/Motor Wheel's witness, Phillip Rosenberger, testified for six days at trial as to Goodyear's warning efforts in the 1960's, 1970's and 1980's. T. 8,589-9,338.

Moreover, there is nothing in JIG III 119 (failure to warn instruction), which limits Goodyear's duty to warn to the time of manufacture. RA. at 317-18; T. 14,033-34. As this Court correctly observes in the *Hodder* opinion, the warning instruction was broad in scope, complied with all of the evidence submitted at trial, the jury could find that Goodyear had a duty, the breach of which was a direct cause of Dale Hodder's injuries.

As Plaintiff's counsel argued at the trial court level, the JIG III instruction included not only Goodyear's duty to warn, but also its duty to instruct in the safe use of the KWX truck rim. T. 13,681.

There is no evidence in this trial, and Goodyear cites none, for the proposition that safety warnings reached Remer. This issue has been previously argued by Goodyear and is not a proper subject in the Petition for Rehearing. Contrary to Goodyear's position, neither Zorman (Hodder's employer) nor Hodder ever received any warning or instruction concerning the specific dangers of the K-type rims or how to avoid those dangers. T. 2,877-80. Again, this issue has been fully discussed in Dale Hodder's Responsive Brief. The testimony was that if such information had been provided, Zorman would

have displayed it at Remer Oil. T. 9,432-34. The citations to the transcript on page 6 of Goodyear's Petition do not stand for the proposition that "Remer testified it fully instructed Hodder in safety practices . . ." but rather cite to portions of Dale Hodder's direct testimony of various procedures he would go through while working for Remer Oil. Certainly there is no evidence that Dale Hodder received instructions or warnings concerning the specific dangers associated with the KWX truck rim. T. 2,738, 2,768.

Goodyear further argues that this Court has overlooked the failure to warn instruction which must be based upon negligence concepts. *See* Respondent Hodder's Brief at 23-28. The jury was fully instructed on negligence principles when it came to assessing Goodyear's duty to warn and instruct. The jury assessed Goodyear's "duty to give reasonable warnings" of dangers inherent or "reasonably foreseeable" in using the KWX truck rim. T. 14,033. Goodyear was under a duty to give "adequate warnings" and Goodyear is negligent for breach of this duty. Goodyear cites *Germann v. F. L. Smithe Machine Co.*, 395 N.W.2d 922 (Minn. 1986), *Hauenstein v. Loctite Corp.*, 347 N.W.2d 272 (Minn. 1984), and *Bilotta v. Kelley Company, Inc.*, 346 N.W.2d 616 (Minn. 1984), *appeal after remand*, 358 N.W.2d 679 (1984) (review denied), which are all cases that are incorporated into the JIG III 119 instruction. T. 13,570.

Goodyear's argument here fails to recognize that all the evidence at trial, including its own offered proof, is directed at post-sale warning efforts and was not so narrowly focused to the time of sale so as to preclude jury consideration of Goodyear's continuing duty to warn

and fully instruct in the dangers associated with the use of the KWX truck rim.

Goodyear's vague references to undefined constitutional rights, including Article I, § 4 of the Minnesota Constitution and due process principles under the federal and state constitutions, were not raised in its Answer or Amended Answer, were not briefed or argued at trial, were not raised in Goodyear's motions for a new trial and were not raised as issues on appeal by Goodyear.

III. PUNITIVE DAMAGES ARE PROPER WHEN PLAINTIFF HAS PROVEN BY CLEAR AND CONVINCING EVIDENCE THAT GOODYEAR'S CONDUCT VIOLATES THE STANDARDS SET FORTH IN MINN. STAT. § 549.20. AT THE SAME TIME, PLAINTIFF'S PROOF DEMONSTRATED GOODYEAR WAS NEGLIGENT WHEN IT BREACHED ITS DUTY TO WARN AND INSTRUCT, AND THIS NEGLIGENCE WAS A DIRECT CAUSE OF DALE HODDER'S INJURIES.

Goodyear re-argues the position it asserted in its principal and reply briefs. Goodyear mischaracterizes the basis of its liability in the *Hodder* case. Goodyear was held liable to Dale Hodder based upon the negligence principles on which the case was tried. These principles included duty, breach of duty, causation and damages. The jury was instructed on negligence principles, including Goodyear's duties and responsibilities to warn and instruct, Dale Hodder's duties and responsibilities, Remer's duties and responsibilities, together with a separate instruction on causation. RA. 296-330; T. 14,012-14,045.; *see* Respondent Hodder's Brief at 23-35.

Reference is specifically made to Respondent Hodder's Brief at page 26 which cites Goodyear's pre-trial stipulation that it had a post-sale duty to warn. RA. 247-48. Hodder also distinguishes *Lewis v. Equitable Life Assurance Society*, 389 N.W.2d 876 (Minn. 1986) in his Brief. Respondent Hodder's Brief at 32-33. This Court has already reviewed the *Lewis* decision and distinguished it from *Hodder* on page 14 of the slip opinion.

Goodyear knows Plaintiff submitted the warning issue on negligence principles because Hodder elected to do this at the conclusion of the trial and prior to submitting the instructions to the jury. T. 12,652; 12,876.

IV. PUNITIVE DAMAGES WERE PROPER IN THIS CASE BASED ON THE STANDARDS SET FORTH IN MINN. STAT. § 549.20.

Goodyear raises constitutional issues in this section of its Petition for Rehearing for the first time. The constitutional issues discussed in this section were not raised as an affirmative defense in its Answer or Amended Answer to Plaintiff's Complaint or Amended Complaint. were not briefed or argued to the trial court, were not raised in its post-trial motions, were not raised on appeal in Goodyear's principal or reply brief, and no notice of the issues was ever given to the Attorney General at either the trial or appellate court levels.

Goodyear's Petition for Rehearing cites *Bankers Life & Casualty Co. v. Crenshaw*, ... U.S.L.W. ..... (May 16, 1988), and quotes dicta from Justice Sandra Day O'Connor's concurring opinion concerning the imposition of punitive damages. The *Crenshaw* court, however, dismissed Bankers Life & Casualty Company's appeal be-

cause the constitutional issues had not been properly preserved in the proceedings below.

In its argument that the imposition of punitive damages is unconstitutional, Goodyear relies heavily upon *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). *Gertz*, however, held that states may define standards of liability for a publisher or broadcaster and permit recovery for punitive damages when liability is based on knowledge of falsity or reckless disregard of the truth. *Id.* at 347-49. There is no inconsistency between the *Gertz* opinion and this Court's analysis of the proof at trial in *Hodder* which demonstrated the willful indifference of Goodyear by clear and convincing evidence pursuant to Minn. Stat. § 549.20. Furthermore, in *Gertz*, the First Amendment issues were raised at the outset of the case, were fully briefed and reviewed both at the trial and appellate court levels prior to review by the United States Supreme Court.

V. PUNITIVE DAMAGES WERE BASED UPON STANDARDS AND PRINCIPLES OF LAW WHICH DID EXIST PRIOR TO DALE HODDER'S INJURIES IN 1981.

In this section Goodyear raises constitutional issues for the first time in its Petition for Rehearing which it did not raise in its Answer or Amended Answer; Goodyear did not raise these specific constitutional issues during motions in limine or during the trial and did not raise them on appeal to this Court. Goodyear also did not give notice to the Attorney General at the trial or appellate court levels on these specific issues. Accordingly, these issues were not preserved and are improperly raised for the first time this Petition for Rehearing.

A. Punitive Damages Were Based Upon Well-Recognized Negligence Principles And The Standards And Guidelines Set Forth In Minn. Stat. § 549.20.

JIG III 119, together with the other instructions as given to the Hodder jury, is based upon long standing negligence principles including the concepts of duty, breach of duty, causation and damages. T. 14,012-46. This is not a new or *ex post facto* application of negligence law.[2]

This issue was previously briefed and argued by the parties. See Respondent Hodder's Brief at 22-35, particularly at page 26 where Goodyear admits it has a post-sale duty to warn. RA. 247-48.

Of all the proof offered by Hodder on Goodyear's inadequate warning efforts, Hodder specifically cites to the Smith memo noted in footnote 6, page 12 of this Court's slip opinion in *Hodder*. Smith finds that the "conspicuous conclusion" of rim failures is that the majority are KB/KW/KWX series. RA. 26; *see also* T. 12,873. At trial, Goodyear's motions for a directed verdict on these issues were denied. T. 13,642-43.

Goodyear's premise that it has been convicted and fined for violating a law, citing JIG III 119, is incorrect.

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2. In a law review article cited by this Court on page 9 of the slip opinion, Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U.L. Rev. 796 (1983), the author notes at page 814:

> . . . the ex post facto clause of the Constitution [of the United States] does not prevent state courts from applying new tort rules retroactively, and retroactive application is of course the strong common law tradition.

Schwartz at 814, citing, *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-91 (1798); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 14-20 (1976); *Nicholson v. Judicial Retirement and Removal Commission*, 562 S.W.2d 306 (Ky. 1978), *appeal after remand*, 573 S.W.2d 642 (Ky. 1978).

Hodder's common law tort action against Goodyear is not a "law" as defined in Article 1, § 10 of the United States Constitution. It is a common law duty, recognized by the trial court,[3] the breach of which the jury found caused Dale Hodder's injuries.

Dale Hodder has fully argued the application of Minn. Stat. § 549.20 to the facts of this case. Respondent Hodder's Brief at 28-35.

Goodyear derogates this Court's accurately detailed analysis when it complains that Goodyear's liability for punitive damage was upheld because of this "Court's ill-advised and unsupported judgments about the adequacies of Goodyear's warning distribution efforts which admittedly did *reach* Remer." Goodyear's Petition for Rehearing at 13. Goodyear cannot cite any document or any part of the transcript in this case to support its representation that warning materials reached Remer. The uncontroverted proof is to the contrary. There is no evidence that warnings of the K-type or KWX truck rim ever did reach Hodder, Zorman or anyone in Remer, Minnesota. Dale Hodder had never seen literature on the Goodyear K-type wheel (T. 2,738) and had never seen a Goodyear/Motor Wheel representative at the Remer Oil Company or Goodyear's film on the subject of the K-type rim. T. 2,768. Neither Zorman nor Hodder ever received any warning or instruction on the specific dangers of K-type rims or how to avoid those dangers. T. 2,877-79. If such information had been provided, Zorman would have displayed it at Remer Oil. T. 9,432-34.

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3. *Germann v. Smithe Machine*, 395 N.W.2d 922, 924 (Minn. 1986).

There is overwhelming evidence supporting this Court's review of the record and its determination that a jury could find that Goodyear's failure to warn users of how to use the K-rim was supported by clear and convincing evidence of willful indifference and was a direct cause of Dale Hodder's injuries.

B. Punitive Damages Were Properly Based Upon The Guidelines Set Forth In Minn. Stat. § 549.20 Which Also Proved Goodyear Breached Its Duty To Warn And Instruct Pursuant To JIG III 119.

Goodyear in this subsection makes a vague reference to due process without citing either the state or federal constitution and it raises issues here for the first time in its Petition for Rehearing. No notice was given to the Attorney General on these issues either at the trial or appellate court levels.

This issue was fully briefed by the parties on appeal. See Respondent Hodder's Brief at 22-35. JIG III 119, as it was given to the jury in light of the proof at trial, was broad enough in its scope for a jury to find that Goodyear had a post-sale duty to warn,[4] the breach of which caused Dale Hodder's injuries and constituted negligence on Goodyear's part. This is not a standard-less instruction and is an accurate statement of the law in the context of this case.

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4. See page 26 of Respondent Hodder's Brief setting forth Goodyear's admission of its post-sale duty to warn. RA. 247-8.

VI. THE JURY INSTRUCTION ON PUNITIVE DAMAGES EMBODIED THE STANDARDS SET FORTH IN MINN. STAT. § 549.20 WHICH WERE STRICTLY APPLIED IN THIS CASE.

Once again, Goodyear raises constitutional arguments in this section of its Petition for Rehearing which were not raised as affirmative defenses in its Answer or Amended Answer to Plaintiff's Complaint or Amended Complaint. Goodyear also did not give notice to the Attorney General at the trial court level on the constitutional issues raised in this section of its Petition for Rehearing. Goodyear's vague reference to due process here does not state which constitution it is relying upon.

This punitive damage argument raised by Goodyear has been fully briefed by the parties and Hodder refers this Court to his brief where he very specifically presents his argument as to the application of Minn. Stat. § 549.20 and JIG III 195 with reference to the proof in this case. Respondent Hodder's Brief at 28-35. The instructions as given to the jury, in light of all the proof at trial, were not as narrow as Goodyear now claims.

Contrary to Goodyear's statement at page 15 in its Petition, this Court did not make a "finding" that Goodyear was willfully indifferent in its warning distribution efforts—the jury made that finding.[5]

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5. Goodyear does not cite a single page in the transcript for the proposition that Remer received warning information as it alleges in its Petition for Rehearing. Goodyear's claim that Hodder's employer would have disregarded warnings if he had received them is inaccurate. The unrefuted testimony is that neither Zorman nor Hodder ever received any warning or instructions of the specific dangers of K-type rims or how to avoid those dangers. T. 2,877-79. If such information had been provided, Zorman would have displayed it at Remer Oil. T. 9,432-34.

The cases cited by Goodyear for the proposition that the basis for the award of punitive damages violated its due process rights by "convicting one for crimes other than the one with which he is charged" do not support Defendant's assertion. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), is not applicable to the issues in *Hodder* and is distinguished at page 20, *supra*. The *Gertz* decision does not state that the imposition of punitive damages violates one's rights to due process.

International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42 (1979), cited by Goodyear for the same proposition also does not support the contention that the imposition of punitive damages violates one's due process rights. The *International Brotherhood* Court held that punitive damages may not be assessed against a union that breaches its duty of fair representation by failing to properly pursue a grievance because the Railway Labor Act does not allow for the recovery of punitive damages—and not because the United States Constitution prevents the recovery of such damages.

VII. GOODYEAR REQUESTED THIS COURT TO REMIT THE PUNITIVE DAMAGE AWARD. THIS REDUCTION DOES NOT DEPRIVE GOODYEAR OF ITS RIGHTS TO TRIAL BY JURY OR DUE PROCESS.

Goodyear requested a remittitur of the punitive damage verdict in its Appellate Brief at page 50 and at oral argument. It may not now complain about the reduction granted by this Court. In fact, Goodyear relies upon this Court's remittitur when it claims to be the prevailing party on appeal. A-7; A-10; A-11.

It is the unique public aspect of punitive damages that invokes this Court's close supervision over such awards. *Hodder*, slip op. at 18. This Court did not order a new trial because all issues had been fairly litigated. A new trial on the issue of punitive damages may result in a higher award when the same evidence which established fault is again exhaustively presented to decide the egregiousness of that fault.

In *Stanger v. Gordon*, 244 N.W.2d 628 (Minn. 1976) this court reduced a punitive damage award without ordering a new trial:

> Mindful as we are of intruding on a function addressed almost entirely to the trial judge's discretion, we are collectively agreed that the punitive damages should be reduced to $7,500. We do not, as is generally the case, condition this reduction upon plaintiff's consent because we regard a retrial limited to the issue of punitive damages as impractical and a new trial on all issues is realistically unacceptable to plaintiff.

Id. at 632.

Hodder has already presented his analysis of the punitive damage issue. Respondent Hodder's Brief at 22-35. This Court applied a similar analysis at page 18 of the *Hodder* slip opinion.

The *Shu-Tao Lin v. McDonnell Douglas Corp.*, 742 F.2d 45 (2d Cir. 1984) cited by Goodyear is neither binding nor persuasive precedent. *Shu-Tao Lin* was litigated in Federal Court and its decision was based upon the Seventh Amendment to the United States Constitution, which is inapplicable to state court proceedings. See pages 9-10, *supra*. The United States Court of Appeals, Seventh Cir-

cuit held that a reduction of *compensatory* damages by the federal district court judge was a violation of the Seventh Amendment's guarantee of a right to a trial by jury. Unlike *Hodder*, there were numerous errors that occurred in *Shu-Tao Lin*, which required a new trial. Both legally and factually, *Shu-Tao Lin* is not applicable to the issues raised in Goodyear's Petition for Rehearing or to any of the facts in the *Hodder* case.

Having urged this Court to remit punitive damages, Goodyear now alleges the reduction violates its right to a jury trial pursuant to the federal and Minnesota constitutions. The federal Constitution is inapplicable and this Court has already stated that remittitur of a punitive damage award is an appropriate exercise of its power.

Moreover, Goodyear may not seek relief and, after the Court *grants* it, claim that the reduction violates its jury trial rights.

VIII. THE ISSUES OF LIABILITY AND COMPENSATORY DAMAGES HAVE BEEN FAIRLY TRIED AND NEED NOT AGAIN BE EXHAUSTIVELY PRESENTED TO A JURY TO DECIDE ONLY THE EGREGIOUSNESS OF GOODYEAR'S FAULT.

In this section Goodyear asserts constitutional arguments that it did not raise in its Answer or Amended Answer to Plaintiff's Complaint or Amended Complaint, did not raise and present at the trial level, in its post-trial motions, or on appeal in its principal or reply brief.

Even though Goodyear requested a remittitur and claims to be the prevailing party on appeal, it nevertheless re-argues factual issues which have been exhaustively

analyzed and reviewed by this Court following extensive briefings on the subject by Goodyear/Motor Wheel, Hodder and Remer Oil Company.

A. This Court Accurately Evaluated The Record.

Dale Hodder has already addressed the factual disputes that Goodyear once again raises in this section of its petition. Respondent Hodder's Brief at 1-10; 22-45. Goodyear fails to recognize that this Court reviews the evidence submitted by all the parties at trial from which a jury could make factual determinations in arriving at its verdict.

As this Court observes, there is ample evidence that Goodyear withheld accident reports from the DOT and misrepresented the reason for discontinuing K-rims. The unrefuted testimony is that the KWX truck rim was discontinued from production in 1962. T. 6324-26. Despite representations to DOT that "nothing really happened" with KB/KWX rim and that it was discontinued for commercial reasons, Goodyear engineer Gerbeth acknowledged to Goodyear defense counsel in 1971 that similar cases of explosive separation of KB/KWX rims were a significant factor in its discontinuance and that Goodyear was faced with the problem of warning users of K-rim problems. Hodder's Exhibit 500, RA. 1, 56, 80. Gerbeth also proposed to Goodyear management in 1971 to drop the K-KW rim for safety because it required an extra step to insure complete lock. RA. 8.

The documentary evidence submitted by Hodder at trial allowed for the factual conclusion by the jury that the KWX-KB rim was discontinued for safety reasons in early 1962. RA. 80. Aside from the factual testimony at trial, a jury certainly could draw the inference from Plain-

tiff's Exhibit 19 (RA. 1) that Goodyear engineers Burns and Gerbeth misrepresented to the DOT that the discontinuance of the KWX lightweight split rim was for commercial reasons and failed to disclose the accidents which precipitated that decision. Gerbeth acknowledges in Plaintiff's Exhibit 500 (RA. 80, 86) that, in addition to the *Huizenga* case being investigated by the DOT at the time, there were about 20 similar cases filed against Goodyear. Gerbeth admitted "quite freely that he was instrumental in inducing the company to stop producing the lightweight split rims in 1962" because "events similar to the instant case had occurred and this was a *significant factor* in discontinuing this product" RA. 86 (emphasis added).

In 1973, Goodyear/Motor Wheel engineer Smith acknowledged that information and warning literature on the K-type rim was not reaching the user. RA. 24; *Hodder*, slip op. at 12 n.6. When one looks at Goodyear's Exhibit 207 (A-35, A-61 to 62) in which Motor Wheel advertised Goodyear's K-type rims for sale four years after the Smith study, and six years after Plaintiff's exhibit 500 (RA. 80) one can appreciate that the total corporate conduct of Goodyear with reference to warning literature rises to the level of willful indifference.

Also, Goodyear fails to recognize that this Court explains in its opinion that, wherever it refers to Goodyear, this includes Motor Wheel, unless the context or text otherwise indicates. *Hodder*, slip op. at 10, n.5. Goodyear purchased the Motor Wheel Corporation making it a wholly owned subsidiary in 1964. T. 10,540, 10,545, 8,611. From 1964 through 1981, Motor Wheel's advertising agency took over the sale, promotion and warning and instructional efforts related to Goodyear rims and wheels, including K-type rims. T. 8,613-14.

B. This Court's Basis For Punitive Damages Is Consistent With Its Holding.

Goodyear here re-argues the factual issues which had been resolved against it by the jury, upheld by the trial court and reviewed by this Court. Goodyear's OSHA argument is inconsistent with this Court's review of the record. This Court recognizes that Goodyear's indifference rested not in its campaigning for OSHA regulations, but rather in its assumption that the OSHA program absolved it of pursuing a vigorous warning program of its own. *Hodder*, slip op. at 16 n.7. Goodyear also re-argues evidentiary rulings of the trial court, affirmed by this Court on appeal and takes out of context the facts which demonstrate its willful indifference. *See* Respondent Hodder's Brief at 28-46.

IX. THE EVIDENCE AT TRIAL AMPLY SUPPORTS THE FINDING THAT GOODYEAR BREACHED ITS DUTY TO WARN AND INSTRUCT IN THE USE OF THE KWX TRUCK RIM.

In this section, Goodyear raises constitutional issues which it did not raise in its Answer or Amended Answer, did not argue or brief at the trial court level, in its post-trial motions, or its appeal to this court. These issues are not preserved on the record and are not proper subjects in Goodyear's Petition for Rehearing.

Goodyear once again argues facts that have been decided both by the jury, and trial court and have been reviewed by this Court in Goodyear's appeal. There is no justification for Goodyear's assertion that it somehow was held responsible for the actions or inactions of employees and representatives of its sole distributor in Min-

nesota—Pioneer Rim & Wheel Company. A-63. Neither Goodyear nor Motor Wheel made a claim against Pioneer, nor did they ask that the negligence, if any, of Pioneer Rim & Wheel Company be compared with that of Goodyear/Motor Wheel, Remer or Hodder.

The arguments advanced by Goodyear here have been fully briefed by Dale Hodder. *See* Respondent Hodder's Brief at 1-10, 22-35, 39-42.

Goodyear's reliance upon the OSHA standard, for the proposition that the standard greatly reduced rim accidents and therefore demonstrates lack of willful indifference (Goodyear's Petition for Rehearing at 25-26), is refuted by Goodyear's Answers to Interrogatories in the case of *Germanio v. The Goodyear Tire & Rubber Company*, Docket No. 87-3857 (J.F.G.) United States District Court, District of New Jersey (1988). Goodyear's Answers to Interrogatories with reference to other K-rim accidents detail 25 additional accidents since Dale Hodder's 1981 injuries. A-14 to A-34. This is exactly what was predicted by Goodyear's engineering statistics expert McCarthy when he testified in the Hodder trial that K-rim accidents will continue to occur into the 21st century on an increasing basis unless some counter measures are taken. T. 11,839-40.

Goodyear's conduct is more than negligent when it comes to warning and instructing how to use the KWX truck rim. As this Court recognized, there was sufficient proof (clear and convincing evidence) that Goodyear acted with willful indifference for failing to properly warn and instruct users how to use the KWX truck rim.

Finally, Goodyear never points out to this Court why $4 million is excessive under the Eighth Amendment and Article 1, Section 5 of the Minnesota Constitution. Goodyear never once argues that this award is excessive in relation to Goodyear's net worth, its culpable conduct or the damages sustained by Dale Hodder or any other criterion.

* * *

Supreme Court, U.S.
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No. 88-626

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE GOODYEAR TIRE & RUBBER COMPANY,
Petitioner,

v.

DALE L. HODDER,

Respondent.

REPLY MEMORANDUM

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REPLY MEMORANDUM

Respondent challenges the adequacy of petitioner's presentation of its federal questions to the Minnesota courts through a series of factual assertions that are either irrelevant to that issue or are refuted by the record in this case. Respondent also contends that he should prevail on the merits of these questions. Goodyear will address each of these arguments in turn.

1. Presentation of Question 1—The Due Process Clause Challenge to the Imposition of Punitive Damages for Having Failed in the Past to Have Complied with a Subsequently Formulated Legal Standard

Respondent argues at great length, Opp., at 4-13, that Goodyear was aware that he was seeking to establish liability on the theory that Goodyear had failed to meet a continuing duty to warn persons in respondent's position of hazards associated with misuse of KWX rims. Goodyear, however, has never contended that it was unaware of respondent's proposed new legal theory. Indeed, as respondent observes, Opp. at 6, Goodyear filed pretrial motions *in limine* to exclude evidence related to this theory of liability and the trial court denied those motions at that stage of the proceedings.

Its motions *in limine* having been denied, Goodyear understandably introduced evidence at trial of the substantial efforts it had made *voluntarily*—not under legal compulsion and not in recognition of any legal duty—to inform users of the KWX rim regarding the dangers of its misuse. Goodyear, however, never acceded[1] to the proposition that

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[1] Respondent, Opp., at 11-12, asserts that Goodyear "acknowledg[ed]" a post-sale duty to warn by *offering* to stipulate, eighteen months prior to trial and in return for an agreement by respondent to limit discovery, that it had become aware in the mid-1970s of certain consequences associated with the misuse of multi-piece tire rims. The limited purpose of that proffered stipulation was to strike a bargain with respondent regarding evidence and discovery. What respondent fails to point out

Minnesota law imposed a continuing post-sale duty to warn and, as this case went to the jury, the trial court concurred in Goodyear's position. Respondent, for the second time in this Court,[2] fails to acknowledge this crucial fact, which is demonstrated by a colloquy reproduced in App. E to the Petition, 39a-40a, but which merits reiteration here:

> [MR. RISJORD, counsel for respondent Hodder:] You could punish them sure, and you punish for past acts. Punitive damages is based on the past acts, the failure up to the time Dale Hodder got hurt to tell anybody, why didn't—
>
> MR. HENDRICKS [counsel for Goodyear]: Objection, Your Honor. That's improper argument on punitive damages.
>
> [13,956] MR. RISJORD: No. it's a continuing failure to warn.
>
> THE COURT: Sustained.
>
> MR. RISJORD: Well, they are liable for a continuing failure to warn up to the time —
>
> MR. HENDRICKS: Same objection, Your Honor.
>
> MR. RISJORD:—Dale Hodder was injured.
>
> MR. HENDRICKS: Outside the scope of the instructions and improper.
>
> MR. RISJORD: No, it isn't; no it isn't.
>
> THE COURT: Sustained.

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to the Court is that he refused to accept that proposed stipulation, which therefore never existed and has no relevance to this case in the Minnesota courts or this Court.

[2] Respondent presented a virtually identical argument in his Opposition to Goodyear's Application to Continue Stay without mentioning that the trial court had ruled that this case would not be presented to the jury on a continuing-duty-to-warn theory.

The record in this case is therefore quite specific. The trial court precluded, and therefore the jury could not have imposed, punitive damages on Goodyear for violating a continuing, post-sale duty to warn. Respondent did not challenge the trial court's order on this point by filing a cross appeal, known in Minnesota as a "notice of review," as he was required to do under Minn. R. App. P. 106.[3] Thus, this case did not go to the jury or on direct appeal to the Supreme Court of Minnesota on a continuing, post-sale duty to warn theory. Goodyear therefore had no occasion and no obligation, as a matter of state law, to object to an award of punitive damages on the basis of such a theory. It was only when the Supreme Court of Minnesota resurrected that theory[4] and, in doing so, approved that theory for the first time in its jurisprudence, and then imposed a $4,000,000 penalty on Goodyear for not adhering to that duty eight years earlier, that Goodyear had the occasion and obligation to object. And Goodyear did so in the first pleading filed thereafter—its Petition for Rehearing.[5]

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[3] Under Minn. R. App. P. 106, an appellee is required to file a "notice of review" within fifteen days of the filing of the appellant's notice of appeal if it wishes to preserve for appellate review issues decided adversely to it by the trial court.

[4] In its decision, the Supreme Court of Minnesota acknowledged that the instruction given to the jury on duty to warn "seems to be drafted with time-of-sale warnings primarily in mind" but went on to state that that instruction "does not purport to preclude a post-sale duty to warn nor to declare what the law might be on the subject." Pet., App., 12a. Having thus concluded that that instruction did not inform the jury regarding the correct law to apply, that court went on to declare for the first time in its jurisprudence that "a continuing post-sale duty to warn existed" and, remarkably, that this duty "was adequately submitted." *Id.* The most clairvoyant litigant could not be charged with anticipating such a feat of judicial legerdemain.

[5] Respondent, Opp., at 7-8, cites a number of Minnesota and non-Minnesota cases for the proposition that Goodyear, by the time of trial, should have known "the direction the appellate courts would take" with

2. Presentation of Question 2—Goodyear's Due Process Clause Challenge to the Limitless and Standardless Imposition of Punitive Damages

Without any specific focus on Goodyear's presentation to the Minnesota courts of its federal constitutional objections to the imposition of unlimited punitive damage awards under vague, subjective and elastic standards, respondent asserts broadly, Opp., at 13-16, that questions presented for the first time on rehearing will not be heard by the court below and that Goodyear failed to alert the Attorney General of Minnesota to this challenge, Opp., at 17-22. These assertions are meritless for several reasons.

First, as Goodyear documents in its Petition, at 11-12 n.3, it challenged the "free rein" given to this jury, operating under vague and general standards, on due process grounds in the trial court and on direct appeal quoting, *inter alia*, this Court's decision in *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813, 828-29 (1986). Indeed, in his brief on direct appeal respondent, without suggesting that this argument had not been raised properly in the trial court, joined issue and took the position that *Aetna* was "not even remotely on point." App., *infra*, 2a. *Aetna* is, however, precisely on point, which may explain why respondent's Opposition does not even acknowledge Goodyear's reliance on *Aetna* on direct appeal—a reliance which undermines completely the premise of his argument that this issue was raised for the first time on rehearing.

Second, the punitive damage award at issue in this case is the $4,000,000 award imposed *de novo* by the Supreme

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respect to a potential continuing duty to warn. Given the posture of this case as it went to the jury and on direct appeal, those cases are irrelevant to the question *when* Goodyear should have presented its Due Process Clause challenge to the imposition of punitive damages under a newly recognized standard of conduct. To the extent relevant, those cases are discussed *infra* in connection with the merits of this Due Process Clause issue.

Court of Minnesota after it determined that the jury's award had to be set aside because based upon an incorrect legal theory, *i.e.*, an alleged duty to recall. Goodyear was not required to challenge, nor could it have challenged, the constitutionality of *this* punitive damage award until its petition for rehearing was filed. But in that petition, at its first opportunity, it did so.[6] Respondent's only apparent response to this obvious defect in his argument is the assertion, Opp., at 2, 25, that the court below "remitted" the award to $4,000,000. As Goodyear, however, demonstrates in its Petition, at 10-11, the Supreme Court of Minnesota, in fact, imposed this $4,000,000 punishment *de novo* on a legal theory with respect to which the jury had not been instructed and that had never previously been recognized by that court. This was in no sense a "remittitur," nor did the court below regard it as such (the word "remittitur" does not appear in the opinion of the court below). However labelled, the substance of the action taken by the Supreme Court of Minnesota in imposing this $4,000,000 award stands independently of the jury's award. It is the action of the Supreme Court of Minnesota that is now at issue in this Court.

Third, Goodyear did not notify the Attorney General of Minnesota of this challenge because this challenge is not an attack on any particular Minnesota statute. Rather, it was and is an attack on the absence of any Minnesota statutes or court decisions placing maximum limits on punitive damage awards and adequately constraining the discretion of juries and, as in this case, appellate courts, in

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[6] This fact also disposes of respondent's contention, Opp., at 21, that the court below was deprived of the opportunity to review the constitutionality of the punitive damage award as a matter of state constitutional law. In its Petition for Rehearing, Pet., App., 46a, 48a, 52a, 58a, 60a, Goodyear expressly and repeatedly interposed the pertinent provisions of the Minnesota Constitution against this punitive damage award.

their exercise of their power to impose punitive damages.[7] Until Minnesota enacts such a statute, defendants in Goodyear's position have no statute to attack.[8]

3. The Presentation of Question 3—The Excessive Fines Clause Challenge to the $4,000,000 Punitive Damage Award

As discussed above, the punitive damage award at issue is that imposed *de novo* by the Supreme Court of Minnesota. Without contesting this fact, respondent, Opp., at 27, asserts that Goodyear "cannot rely upon the decision in this case . . . ." in this regard because Goodyear could have raised an Eighth Amendment challenge to the jury's award. But the jury's award was set aside because it was predicated on a legal theory that had not been submitted to it—failure to recall. Goodyear prevailed on this point on appeal, Pet., App. A, 18a-20a. Had the court below stopped at that point and ordered a retrial limited to punitive damages, there would have been no punitive damage award subject to objection by petitioner. The court below went on to act as both jury and reviewing court in imposing a *new* $4,000,000 award on a *new* legal theory,

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[7] The assumption underlying respondent's entire argument regarding notification of the Minnesota Attorney General is that Goodyear challenged *Minn. Stat.* § 549.20 (1987) on its face, because the law is clear that the Minnesota Attorney General need not be notified of cases in which the application of a statute to a particular case is challenged as unconstitutional. *See Clay* v. *Clay*, 397 N.W. 2d 571 (Minn. App. 1987). Nowhere does respondent suggest to this Court the basis for this critical assumption, which is unsupportable.

[8] Respondent, Opp., at 16, maintains that a litigant seeking to attack the constitutionality of a statute in Minnesota must do so pre-trial because such attacks are viewed as "affirmative defenses" that are "waived." However, neither the Minnesota rule cited by respondent nor the Minnesota cases relied upon by him involve or make any reference to constitutional challenges to statutes or otherwise purport to deal with the timeliness of a constitutional challenge to the *de novo* imposition of a punitive damage award by the Supreme Court of Minnesota.

mooting completely the question of the constitutionality of the jury's $12,500,000 award under the Eighth (or Fourteenth) Amendment. Goodyear's constitutional objections to the new punitive damage award were immediate and, therefore, timely.

4. No Prudential Considerations Counsel Against Review of Minnesota's Punitive Damage System in this Case

Respondent argues that the $4,000,000 award in this case "evidences" the close control that the Supreme Court of Minnesota exercises over the imposition and size of punitive damage awards. Opp., at 28. As Goodyear argues, however, the $4,000,000 figure arrived at by that court was completely arbitrary, unsubstantiated, essentially unexplained, and, indeed, could have been virtually any amount. Pet., at 10-11. If, as respondent correctly asserts, the court below is satisfied that it has these issues well in hand, there is no reason to believe that the passage of time will alleviate the need for this Court to review the constitutionality of Minnesota's punitive damage system.

Likewise, respondent asserts that the fundamental issues raised in this case regarding Minnesota's punitive damage system "have been carefully reviewed and regulated by . . . the Minnesota legislature . . . ." Opp., at 26. Respondent apparently takes the position that Minnesota's legislature has done all that needs to be done, but in any event does not suggest that that body is prepared to go beyond the cosmetic actions, Pet., at 24, it has recently taken. In respondent's own view, Minnesota's legislature, like its courts, is satisfied with the punitive damage system. That being the case, there would be no purpose served by any delay in this Court's review of that system and the arbitrary results it produces.

5. The Questions Presented are Substantial and Worthy of this Court's Plenary Consideration in this Case

On the merits, respondent does not appear to disagree that the questions presented by Goodyear are, at least in

the abstract, substantial and important. Rather, he argues that he would prevail because this case "represents the most reasoned approach and result" of punitive damage cases presently or recently on this Court's docket. Opp., at 26. Respondent proves perhaps more than he intends, because if his contentions are correct, then the Court will have the opportunity in this case to approve the Minnesota system as a model for other less enlightened States to follow.

As for Question 1, respondent does not contest that Goodyear should prevail if in fact liability for punitive damages was imposed for violation in 1981 of a legal duty newly announced in 1988. Instead, respondent suggests that a series of five Minnesota cases[9] decided since 1977 "foretold" that the Supreme Court of Minnesota would some day recognize a continuing, post-sale duty to warn as was recognized by that court for the first time in 1988 in this case. Tellingly, not a single one of these cases was relied upon by the Supreme Court of Minnesota in recognizing a continuing, post-sale duty to warn in this case. None of those cases is primarily concerned with a post-sale duty to warn. Indeed, the only case even cited by the Supreme Court of Minnesota in considering this new duty—which, in that court's own words, it had not "had occasion to deal with . . . before," was the decision of the Supreme Court of Michigan in *Comstock* v. *General Motors Corp.*,

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[9] *Frey* v. *Montgomery Ward & Co.*, 258 N.W. 2d 782, 786 (Minn. 1977); *Gryc* v. *Dayton-Hudson Corp.*, 297 N.W. 2d 921 (1980); *Hauenstein* v. *Loctite Corp.*, 347 N.W. 2d 272, 275 (Minn. 1984); *Willmar Poultry Co.* v. *Carus Chemical Co.*, 378 N.W. 2d 830 (Minn. 1985); *Balder* v. *Haley*, 390 N.W. 2d 855 (Minn. App. 1986), *rev'd*, 399 N.W. 2d 77 (Minn 1987). Of these five cases, which are otherwise distinguishable from the case at bar on multiple grounds, only one—*Gryc* v. *Dayton-Hudson Corp.*—involved a claim for punitive damages. *Gryc*, contrary to respondent's suggestion, involved a case in which the product—flannel cloth used for children's pajamas—was known by the manufacturer prior to its sale to be unreasonably dangerous. 297 N.W. 2d, at 730.

358 Mich. 163, 99 N.W. 2d 627 (1959). *Comstock* itself was only cited as analogous, *see* Pet., App., 12a, presumably because, unlike the case at bar, it involved a defective product—this case does not involve a defective product—where the defect became known to the manufacturer "shortly after the product ha[d] been put on the market." 99 N.W. 2d, at 634.

In addition, respondent fails to acknowledge that neither *Comstock* nor four of the five cases upon which he relies even involved the imposition of punitive damages. *See* note 9, *supra*. Goodyear does not contend in this Court that Minnesota is not free to push its common law in new directions and, in doing so, to require manufacturers to *compensate* persons who have been injured, even by non-defective products such as the KWX rim, based upon newly articulated standards of conduct. Indeed, Mr. Hodder has been completely compensated for his injuries by the Minnesota courts and Goodyear has not brought any federal objections to the compensatory award to this Court. Goodyear's argument is that a penalty or fine in the form of *punitive* damages may not be imposed on manufacturers for the violation of such newly announced, retroactively applied standards of conduct because there is no state interest in doing so that is even arguably sufficient to overcome the fundamental unfairness inherent in doing so.

With respect to Question 2, respondent makes the curious argument that legislatures should not place what he terms an "arbitrary ceiling" on punitive damage awards because doing so would allow defendants to "budget" their exposure to such awards into the cost of doing business. Opp., at 25. But the limitless and intentionally capricious system advocated by respondent is contrary to all accepted rationales for punishment and deterrence that form the basis of our legal system. *See, e.g.*, H. Packer, *The Limits of the Criminal Sanction* 45-48 (1968). As stated by Solicitor General Blackstone, "punishments of unreasonable severity, especially when indiscriminately inflicted, have

less effect in preventing crimes, and amending the manners of a people, than such as are more merciful in general, yet properly intermixed with due distinctions of severity." 4 W. Blackstone, *Commentaries on the Laws of England* 16-17 (1768).

With regard to Question 3, respondent asserts that the Court need not be concerned that the $4,000,000 award "far exceeds the maximum punishment established by the Minnesota legislature for similar conduct" because that legislature has otherwise stated some factors to be considered in the imposition of punitive damages. Opp., at 28. Respondent apparently takes the position that the Minnesota legislature need not be concerned at all with the Eighth Amendment's requirement, confirmed in *Solem* v. *Helm*, 463 U.S. 277, 292 (1983), that a punishment authorized by a State be reasonably proportioned to other punishments imposed by that State for similar conduct. If, as Goodyear asserted below and asserts in this Court, the Eighth Amendment applies to punitive damage awards, respondent's position could not be sustained absent a serious retrenchment by this Court from its decision in *Solem*. That, by itself, would present a substantial question worthy of this Court's review.

November 17, 1988

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APPENDIX

NOS. C3-87-419 and C2-87-511

STATE OF MINNESOTA
IN SUPREME COURT

DALE L. HODDER,
Respondent (C3-87-419)
Appellant (C2-87-511)

vs.

THE GOODYEAR TIRE & RUBBER COMPANY
and MOTOR WHEEL CORPORATION,
Appellants (C3-87-419)
Respondents (C2-87-511)

vs.

REMER OIL COMPANY,
Respondent.

DALE L. HODDER'S BRIEF AND APPENDIX

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* * * *

D. The Trial Court Correctly Applied The Standard Punitive Damage Instruction To Failure To Warn In A Product Liability Case And Did Not Thereby Deny Goodyear's Right To Due Process Of Law.

Punitive damages for willful disregard in product liability cases is well recognized in Minnesota. *Gryc, supra.* Here, Goodyear's constitutional argument is also based upon the false promise that the Court submitted punitive damages solely on a newly defined cause of action—failure to recall. To the contrary, the Court submitted punitive damages pursuant to §549.20 and the standard JIG 3rd Ed. 195 instruction. Goodyear's conduct in failing to warn and taking no remedial action in the face of safety engineering recommendations to recall is well defined and an obvious breach of its duty to warn and instruct. Goodyear cannot argue that it had no notice of a duty to recall the KWX rim because it was given such notice by its own field engineering staff and safety vice-president. RA.24, 47, 50. Goodyear cites no case for the proposition that punitive damages in the posture of this case violate its right to due process. *Aetna Life Insurance Co. v. Lavoie*, 106 Sup. Ct. 1580, 1589 (1986), is not even remotely in point. The United States Supreme Court held that Defendant's due process rights were violated because the Alabama Supreme Court Justice who wrote the opinion affirming punitive damages had a similar bad faith insurance claim pending that therefore a stake in the outcome. The Court specifically declined to comment on the appropriateness of punitive damages for insurance company bad faith in Alabama.

* * * * *

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No. 88-626

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

THE GOODYEAR TIRE & RUBBER COMPANY,
Petitioner,
v.
DALE L. HODDER,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF FOR THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., PRODUCT LIABILITY ADVISORY COUNCIL, INC., AND NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION

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OCTOBER TERM, 1988

No. 88-626

THE GOODYEAR TIRE & RUBBER COMPANY,
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v.

DALE L. HODDER,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

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MOTION OF THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., PRODUCT LIABILITY ADVISORY COUNCIL, INC., AND NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITION

Pursuant to Rule 36 of the Rules of this Court, The Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA"), Product Liability Advisory Council, Inc. ("Advisory Council"), and National Association of Manufacturers of the United States of America ("NAM") request leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari. Counsel for the petitioner has consented to the filing of this brief; counsel for the respondent has withheld consent.

MVMA is a trade association whose member companies build motor vehicles and manufacture industrial, lawn, and agricultural equipment, construction and mining machinery, locomotives, railroad rolling stock, winches, and gasoline and diesel engines for various industrial and agricultural uses.

The Advisory Council is an association of industrial companies that was formed for the principal purpose of submitting *amicus curiae* briefs in appellate cases involving significant issues affecting the law of product liability.

NAM is an association of approximately 13,500 companies and subsidiaries that together employ eighty-five percent of all manufacturing workers in the United States and produce more than eighty percent of this nation's manufactured goods. NAM is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council.

The most comprehensive impartial analysis of jury verdicts in the United States in the last two decades shows that business activities by manufacturers such as those who constitute the memberships of MVMA, the Advisory Council, and NAM have borne the brunt of a massive and discriminatory increase in the frequency and size of punitive damages verdicts. Researchers for the RAND Institute for Civil Justice have concluded that "[c]orporate defendants are in fact more likely than individuals or public agencies to be the target of [punitive damages] awards" and that "[p]unitive awards against businesses were far larger than those against individuals in both personal injury and business/contract cases." M. Peterson, S. Sarma & M. Stanley, *Punitive Damages: Empirical Findings* iii, 50 (1987).* Even more disturbing is that "[j]uries also award more money

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* The authorities cited in this motion are also cited in the accompanying brief. The location of these authorities within the brief can be determined by referring to the Table of Authorities.

when the defendants are institutions or organizations rather than individuals—the 'deep-pocket' effect. . . . [W]e can detect a separate, statistically independent effect for deep-pocket defendants, even in cases that do not involve products or malpractice." D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics* 21 (1987).

Thus, the members of MVMA, the Advisory Council, and NAM have suffered multi-layered, systematic discrimination at the hands of juries under the present system. Moreover, the wealth of manufacturing corporations appears to have affected even appellate review of punitive damages awards. The RAND researchers have stated:

> Considerations of . . . defendants' wealth might also affect judicial review of punitive damages. Our survey to determine final award disposition indicated that awards against business defendants were reduced less by post-trial actions than were awards against individuals. . . . [T]he results suggest that not only do business defendants have larger punitive awards assessed against them, but they are also likely to pay a greater portion of those awards.

M. Peterson, S. Sarma & M. Stanley, *Punitive Damages: Empirical Findings* 53 (1987).

These studies confirm what the punitive damages award in this case demonstrates: By giving juries unfettered discretion whether to award punitive damages once a specified level of culpability is found, and by establishing neither a specified maximum of any kind nor objective standards by which the size of punitive awards are to be fixed at trial or reviewed on appeal, punitive damages laws in the great majority of the states have resulted in punishments that, both in frequency and in size, are discriminatory and disproportionate to the harm caused and to the culpability involved. Those laws directly impose on manufacturers, and indirectly impose

on consumers and workers, the burden of unnecessary, unjustified punishments.

Accordingly, MVMA, the Advisory Council, and NAM seek to submit this *amicus curiae* brief to assist the Court in evaluating the public importance and practical consequences of the punitive damages questions presented in the petition for a writ of certiorari. MVMA, the Advisory Council, and NAM respectfully request that their motion for leave to file the accompanying brief as *amici curiae* be granted for that purpose.

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On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

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BRIEF FOR THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., PRODUCT LIABILITY ADVISORY COUNCIL, INC., AND NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION

INTEREST OF THE AMICI CURIAE

MVMA is a trade association whose member companies build motor vehicles and manufacture industrial, lawn, and agricultural equipment, construction and mining machinery, locomotives, railroad rolling stock, winches, and gasoline and diesel engines for various industrial and

agricultural uses. The Advisory Council is an association of industrial companies that was formed for the principal purpose of submitting *amicus curiae* briefs in appellate cases involving significant issues affecting the law of product liability. NAM is an association of approximately 13,500 companies and subsidiaries that together employ eighty-five percent of all manufacturing workers in the United States and produce more than eighty percent of this nation's manufactured goods. NAM is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council. The interest of MVMA, the Advisory Council, and NAM in the punitive damages questions presented in the petition for a writ of certiorari is fully described in the accompanying motion for leave to file this brief as *amici curiae* in support of the petition.

PRELIMINARY STATEMENT

The opinion of the Supreme Court of Minnesota, reported at 426 N.W.2d 826 (Minn. 1988), states the following facts on which MVMA, the Advisory Council, and NAM rely in urging this Court to grant the petition for a writ of certiorari.

This product liability case arises out of injuries caused by a model-KWX tire rim manufactured by The Goodyear Tire & Rubber Company ("Goodyear") in 1955. At some time after the date of manufacture and sale, Goodyear learned that there was a danger of pressurized separation of that type of rim. *Id.* at 829. Accordingly, by the 1970's, Goodyear "was using safety films, posters, manuals, advertising, and promotion of OSHA standards to make known information on maintenance and repair of K-rims and to warn about dangers associated with misassembly or use of worn parts." *Id.* The plaintiff, Dale L. Hodder ("Hodder"), however, did not receive any of Goodyear's post-sale warnings. *Id.* In 1981 Hodder was injured when the KWX rim that he was mounting explosively separated under pressure. *Id.*

The jury found that the KWX rim was not defectively designed, and Hodder did not claim that the rim had been defectively manufactured. The jury found Goodyear negligent, however, on the ground that Goodyear "knew or reasonably could have discovered the danger involved in the use of the KWX rim, and the KWX truck rim was not accompanied by adequate warnings." *Id.* at 832; App. D, 37a.[1] The jury awarded Hodder compensatory damages of $3,368,916 and punitive damages of $12.5 million. *Id.* at 829.

On appeal, Goodyear challenged both the liability verdict and the punitive damages verdict. In addressing the liability issue, the Minnesota Supreme Court observed that it had never before "had occasion to deal with" the question of whether under Minnesota tort law a manufacturer could be held liable for having failed to provide adequate warnings about a risk that was unknown when the product in question was sold. *Id.* at 833. The court further conceded that a comment to the Minnesota pattern jury instructions stated that, for the assessment of a manufacturer's obligation to keep informed of scientific knowledge and discoveries in its field, "the knowledge should be judged at the time the product in question is manufactured." *Id.*

Nevertheless, the court held that "in special cases" a duty to warn of risks discovered after a product has been marketed can arise. *Id.* The court also stated, "we think this is such a case." *Id.* One of the primary bases for that conclusion was that Goodyear had voluntarily disseminated a wide variety of post-sale warnings upon learning of the K rim risk and thereby had "undert[aken] a duty to warn." *Id.* The court then concluded that, despite Goodyear's voluntary dissemination of those warn-

[1] Citations in the form "App. —" refer to the appendices to Goodyear's Petition for Writ of Certiorari to the Supreme Court of Minnesota.

ings and instructions, the judgment of liability should be affirmed because the jury "could have found that Goodyear's warnings were inadequate to reach K-rim users." *Id.*

The court held that the punitive damages verdict of $12.5 million was improper, reasoning that Hodder's trial counsel had asked for $12.5 million based on the cost of recalling 250,000 K rims at a cost of fifty dollars each; that the jury had rejected any obligation to recall by finding the rims nondefective; and that the "conclusion is inescapable that the jury awarded [the specific sum of $12.5 million] on a theory the jury itself had rejected." *Id.* at 836. Rather than remanding for a new trial on punitive damages or on all issues, however, the court determined on its own that a punitive damages award of $4 million would be appropriate. The totality of the court's reasoning was as follows:

> In determining the reduction, we look for proportionality between the egregious misconduct and the amount of damages, keeping in mind "those factors which *justly bear* upon the *purpose* of punitive damages." Minn. Stat. § 549.20, subd. 3 (1986) (emphasis added). Here, first of all, the award must be substantially discounted for the erroneous per-rim recall calculation. Secondly, while the focus is on the dangerous propensity of the K-rim to explode, the egregious misconduct must, under the jury's findings, be restricted to the inadequacies of the warnings; the product itself, it must be remembered, was found not defective, neither in design nor manufacture, nor was there a complete failure to warn. It appears that the jury, in punishing the defendant, may have included factors not "justly bearing" on punitive damages. Finally, the purpose of punitive damages needs to be kept in mind, namely, to punish and deter the conduct found to be willfully indifferent to the safety of others. We conclude, in this case, that an appropriate punitive damages award should

be $4 million. The award, therefore, is reduced from $12.5 million to $4 million.

Id. at 837.

Goodyear challenged the $4 million punitive damages award as a violation of the Due Process Clause of the Fourteenth Amendment and the Excessive Fines Clause of the Eighth Amendment. The Minnesota Supreme Court rejected those challenges. It is these issues that MVMA, the Advisory Council, and NAM urge this Court to review.

REASONS FOR GRANTING THE PETITION

I. REVIEW BY THIS COURT OF THE CONSTITUTIONALITY OF PUNITIVE DAMAGES JUDGMENTS SUCH AS THE ONE IMPOSED BELOW IS NEEDED BECAUSE OF THE IMPORTANCE OF THE ISSUE TO MANUFACTURERS AND TO THE CONSUMING PUBLIC.

The most comprehensive impartial analysis of jury verdicts in the United States in the last two decades, an empirical study by the RAND Institute for Civil Justice, shows that the growth in the average award in the types of litigation that manufacturers regularly find themselves defending "has been truly explosive, reflecting increases ranging from 200 to more than 1,000 percent" in only two decades. D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics* 18 (1987). A primary element in that explosion has been the phenomenal increase in both the frequency and the size of punitive damages awards against manufacturers.

Before 1970, for example, there was only one reported appellate court decision upholding an award of punitive damages in a product liability case, and that was an award of $250,000. *See Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). Today, hardly a month goes by without a multi-million-dollar

punitive damages verdict against a manufacturer. *See, e.g., O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438 (10th Cir. 1987) ($10 million punitive damages verdict), *cert. denied*, 108 S. Ct. 2014 (1988); *Kociemba v. G.D. Searle & Co.*, 16 Prod. Safety & Liab. Rep. (BNA) 893 (D. Minn. Sept. 19, 1988) ($7 million punitive damages verdict); *Ealy v. Richardson-Merrell, Inc.*, 15 Prod. Safety & Liab. Rep. (BNA) 740 (D.D.C. Oct. 1, 1987) ($75 million punitive damages verdict, remitted to zero); *George v. Raymark Industries Inc.*, 15 Prod. Safety & Liab. Rep. (BNA) 865 (Del. Super. Ct. Nov. 9, 1987) ($75 million punitive damages verdict); *Masaki v. General Motors Corp.*, 16 Prod. Safety & Liab. Rep. (BNA) 225 (Haw. Cir. Ct. Feb. 29, 1988) ($11.25 million punitive damages verdict); *Kemner v. Monsanto Co.*, 15 Prod. Safety & Liab. Rep. (BNA) 884 (Ill. Cir. Ct. Oct. 22, 1987) ($16.25 million punitive damages verdict); *Tetuan v. A.H. Robins Co.*, 241 Kan. 441, 738 P.2d 1210 (1987) ($7.5 million punitive damages verdict); *Ford Motor Co. v. Durrill*, 714 S.W.2d 329 (Tex. App. 1986) ($100 million punitive damages verdict, remitted to $10 million); *Roberts v. Seven-Up*, 16 Prod. Safety & Liab. Rep. (BNA) 466 (Utah Dist. Ct. Feb. 18, 1988) ($10 million punitive damages verdict, remitted to $375,000).

The effect of these massive punitive awards on American industry has been, and continues to be, devastating. At least two major American manufacturers have been driven into the bankruptcy courts by multi-billion-dollar punitive damages claims. *See Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988); *In re A.H. Robins Co.*, 85 B.R. 373 (E.D. Va. 1988). Important health products have drastically risen in price or been withdrawn from the market altogether. *See Brown v. Superior Court*, 44 Cal. 3d 1049, 1064, 245 Cal. Rptr. 412, 421, 751 P.2d 470, 479 (1988) (discussing withdrawal of Bendectin from market after price increased by more than 300 percent; also discussing withdrawal of all but

two manufacturers of diphtheria-pertussis-tetanus vaccine, and price increase from eleven cents per dose to $11.40 per dose in four years); Franklin & Mais, *Tort Law and Mass Immunization Programs* (1977) (discussing drug manufacturers' refusal to supply influenza vaccine until Government assumed the risk of lawsuits resulting from injuries caused by the vaccine). Equally important new products have been withheld from introduction altogether. *See Brown v. Superior Court*, 44 Cal. 3d at 1065, 245 Cal. Rptr. at 421, 751 P.2d at 480 (discussing non-introduction of new drug for the treatment of vision problems because of unavailability of adequate liability insurance). American manufacturers have fallen behind in the development of major product groups. *See, e.g.*, Connell, *The Crisis in Contraception*, 1987 Technology Review 47 (statement by Elizabeth B. Connell, M.D., member of FDA Obstetrics and Gynecology Advisory Committee, that "the United States is losing its leadership role in this area [of contraceptive technology]—with potentially disastrous consequences for women and men in this country and elsewhere").

A less obvious effect of these Draconian punishments is that they spawn more frivolous lawsuits, prolong trials, and generate more appeals, all of which further disrupt the country's manufacturing activities. Moreover, the unpredictability of such awards makes it considerably more difficult for manufacturer-defendants and plaintiffs to evaluate cases for settlement.

The effect of these burdens on manufacturers has been felt as a "tax" on every product purchased by consumers:

> The tax accounts for 30 percent of the price of a stepladder and over 95 percent of the price of childhood vaccines. It is responsible for one-quarter of the price of a ride on a Long Island tour bus and one-third of the price of a small airplane . . . . [I]t adds more to the price of a football helmet than the cost of making it. The tax falls especially hard on

prescription drugs, doctors, surgeons, and all things medical.

P. Huber, *Liability: The Legal Revolution and Its Consequences* 3 (1988).

In sum, the unpredictability and magnitude of punitive damages awards against manufacturers is rapidly eroding the very foundation of our industrial base and is detracting from the health and comfort of the consuming public. There is an urgent need for this Court to decide whether the Constitution provides some level of protection against the arbitrariness and excessiveness of this system.

II. REVIEW IS URGENTLY NEEDED BECAUSE THE STATES HAVE FAILED TO ADDRESS THE SYSTEMIC INFIRMITIES THAT THIS COURT HAS SUGGESTED SHOULD BE ADDRESSED.

Twice in the last two years, this Court has suggested that the prevailing punitive damages system presents constitutional issues that need to be addressed. *See Bankers Life & Cas. Co. v. Crenshaw*, 108 S. Ct. 1645, 1651 (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986).

In addition, in opinions spanning a period of almost twenty years, this Court has repeatedly expressed concern that the prevailing punitive damages system too readily enables juries to impose punishment based on prejudice and caprice. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (punitive damages laws leave juries "free to use their discretion selectively to punish expressions of unpopular views") (Powell, J., joined by Marshall, Blackmun, & Rehnquist, JJ.); *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50 n.14 (1979) ("punitive damages may be employed to punish unpopular defendants") (Marshall, J., joined by Brennan, Stewart, White, & Powell, JJ.); *Smith v. Wade*, 461 U.S. 30, 59 (1983) ("punitive damages are fre-

quently based upon the caprice and prejudice of jurors") (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting); *cf. City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981) ("Because evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded, the unlimited taxing power of a municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award.") (Blackmun, J., joined by Burger, C.J., and Stewart, White, Powell, & Rehnquist, JJ.); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 74-75 (1971) (when punitive damages "bear no relationship to the actual harm caused, they then serve essentially as springboards to jury assessment, without reference to the primary legitimating compensatory function of the system, of an "infinitely wide range of penalties wholly unpredictable in amount . . . . Further, I find it difficult to fathom why it may be necessary, in order to achieve its justifiable deterrence goals, for the States to permit punitive damages that bear no discernible relationship to the actual harm caused") (Harlan, J., dissenting); *id.* at 84 ("This discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others.") (Marshall, J., dissenting).

Nevertheless, few states have acted to cure the systemic infirmities that have led to the rash of arbitrary, excessive punitive damages awards described in section I of this brief. It is apparent that the matter will only worsen until this Court acts.

A. Review by This Court of the Constitutionality of Punitive Damages Judgments Imposed Pursuant to State Laws That Permit the Factfinder to Act Arbitrarily in Deciding Whether to Award Punitive Damages Is Urgently Needed.

The salient characteristic of the general punitive damages laws of Minnesota and most other states is that the jury is told only that it "may," in its discretion, impose

punitive damages in an amount "which will serve to punish and deter [the defendant] and deter others from the commission of like acts." App. J, 67a. *Accord, e.g.*, Illinois Pattern Jury Instructions: Civil 35.01 (2d ed. 1971); Pattern Instructions for Kansas 9.44 (2d ed. 1977); Missouri Approved Jury Instructions 10.01-6 (3d ed. Supp. 1987).

Moreover, punitive damages awards frequently are many times larger than the maximum criminal fines that can be imposed for the same or worse conduct, yet none of the procedural safeguards guaranteed to every criminal defendant is provided to punitive damages defendants. Indeed, in punitive damages cases the sentencer and the decider of "guilt" are one and the same, and that decisionmaker hears the sentencing evidence and the liability evidence in one proceeding.

These laws invite arbitrariness and invidious discrimination by factfinders, both in deciding whether to award punitive damages at all and in deciding what amount of punitive damages to award. *Cf. Santosky v. Kramer*, 455 U.S. 745, 763 (1982) (proceedings in which factfinder has "unusual discretion" to weigh facts are "often vulnerable to judgments based on cultural or class bias" and require enhanced procedural safeguards).

In Minnesota, for example, upon finding "clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others," Minn. Stat. § 549.20(1) (1988), the jury may, in its unbridled discretion, choose to award or not to award punitive damages. The jury is told no factor that it may or may not consider in deciding whether to award punitive damages. Simply because one defendant is a Baptist or poor or an individual, rather than a corporation, a jury may choose not to award punitive damages. The same jury may choose to award punitive damages for the identical conduct by a defendant who is Catholic or wealthy or a corporation, rather than an individual. In fact, researchers for the RAND Institute for Civil Justice have

empirically determined that "[c]orporate defendants are . . . more likely than individuals or public agencies to be the target of [punitive damages] awards." M. Peterson, S. Sarma & M. Stanley, *Punitive Damages: Empirical Findings* iii (1987).

This case aptly demonstrates the extent of this anti-corporation prejudice. The Minnesota Supreme Court explicitly conceded that it had never previously considered whether a manufacturer who sells a nondefective product, and who later learns that the product can cause harm if misused, has a duty to warn of the newly discovered risk. *See* 426 N.W.2d at 832-33. The court further conceded that the applicable Minnesota jury instruction guide "seems to be drafted with time-of-sale warnings primarily in mind . . . ." *Id.* at 833. Thus, the court implicitly conceded that, when Goodyear manufactured and sold the rim in 1955, and even when Hodder was injured in 1981, Goodyear had no basis in Minnesota law for believing that there was any duty to warn of risks discovered after a product had been sold.

Even after considering the issue for the first time, the court decided that a post-sale duty to warn "arises only in special cases." *Id.* at 833. The court then weakly concluded, "We think this is such a case." *Id.* The court thus applied this very narrow duty, recognized for the first time in 1988, to a product that had been manufactured in 1955 and that had resulted in injury in 1981.

Moreover, one of the factors that caused the court to find that the post-sale duty to warn existed in this case was that Goodyear, upon learning of the risk presented by misuse of the K rims, had *voluntarily* chosen to "distribute[] warnings and instructions by means of safety films, posters, manuals, and advertising." *Id.* at 834. Thus, the only basis for liability, even for compensatory damages, was that the jury "could have found that Goodyear's [voluntary] warnings were inadequate to reach K-rim users." *Id.* at 834. The court emphasized that the

punitive damages "must, under the jury's findings, be restricted to the inadequacies of the warnings; the product itself, it must be remembered, was found not defective, neither in design nor manufacture, nor was there a complete failure to warn." *Id.* at 837.

Based on its conclusion that a legal duty had arisen in part because Goodyear had voluntarily chosen to warn and instruct about a nondefective product, and based on that newly announced duty, the Minnesota Supreme Court concluded that there was an adequate basis to sustain an award of punitive damages under the Minnesota standard of "willful indifference to the rights or safety of others." Minn. Stat. § 549.20(1) (1988).

The award of punitive damages under these circumstances brings sharply into focus the need for this Court's review of the discretionary punitive damages system. Due process requires that something be done promptly, because "a vaguely defined, elastic standard like 'reckless indifference' gives free reign to the biases and prejudices of juries." *Smith v. Wade*, 461 U.S. at 88 (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting). Due process requires that something be done promptly, because juries cannot continue to be permitted to use prejudice and caprice to decide whether to impose devastating punishment in the form of punitive damages.

B. Review by This Court of the Constitutionality of Punitive Damages Judgments Imposed Pursuant to State Laws That Permit the Factfinder to Act Arbitrarily in Setting the Amount of Punitive Damages Is Urgently Needed.

Minnesota also does not tell the jury what factors may or may not be considered in deciding the amount of punitive damages to impose. The Minnesota statute merely states that the amount must be measured by "factors which justly bear upon the purpose of punitive damages, *including*" a specified list of disparate factors. Minn. Stat. § 549.20 (1988) (emphasis added).

No maximum award is specified by the legislature or by the courts. No specified relationship between the harm caused and the size of the punitive award is required. No proportion between the punishment imposed in one case for one type of wrongful conduct and the punishment imposed in other cases for other types of conduct is required. No relationship between the punishment imposed in one case for particular conduct and the punishment imposed in other cases for identical conduct is required. No instruction is given as to what must be considered or what must not be considered by the jury in determining the amount of punishment. No instruction regarding the deterrent and retributive functions of compensatory damages and defense costs is given.

Thus, unlike the fines specified in Minnesota statutes for every crime, no matter how trivial or how heinous, there is no fixed dollar maximum on the punishment that a jury may inflict by using punitive damages. *Compare, e.g.*, Minn. Stat. § 549.20 (1988) (no maximum punitive damages award) *with* Minn. Stat. § 609.20 (1988) (maximum fine of $30,000 for manslaughter in the first degree); Minn. Stat. § 609.221 (1988) (maximum fine of $20,000 for assault in the first degree); and Minn. Stat. § 609.21 (1988) (maximum fine of $10,000 for criminal vehicular operation resulting in death). Unlike the specific punitive damages awards authorized for violations of Minnesota's antitrust laws, workers' compensation laws, forcible eviction laws, attorney misconduct laws, trespass laws, and at least twenty-five other laws, punitive awards under the general punitive damages statute are not restricted to a specified multiple of the compensatory damages. *Compare, e.g.*, Minn. Stat. § 549.20 (1988) (no maximum specified multiple) *with* Minn. Stat. § 325D.57 (1988) (antitrust violations) (treble damages specified); Minn. Stat. § 176.82 (1988) (obstructing workers' compensation benefits) (treble damages specified); Minn. Stat. § 557.08 (1988) (forcible

eviction) (treble damages specified); Minn. Stat. § 226.06 (1988) (violation of provisions regarding warehouse certificates) (double damages specified).

The most comprehensive impartial analysis of jury verdicts in the United States in the last two decades shows that the result of the discretionary punitive damages system has been that businesses have borne the brunt of massive, discriminatory punitive damages verdicts. The same researchers for the RAND Institute for Civil Justice who found that juries are more likely to impose punitive damages against corporations than against individuals also found that "[p]unitive awards against businesses were far larger than those against individuals in both personal injury and business/contract cases." M. Peterson, S. Sarma & M. Stanley, *Punitive Damages: Empirical Findings* 50 (1987). Even more disturbing is that "[j]uries also award more money when the defendants are institutions or organizations rather than individuals—the 'deep-pocket' effect. . . . [W]e can detect a separate, statistically independent effect for deep-pocket defendants, even in cases that do not involve products or malpractice." D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics* 21 (1987).

Thus, manufacturers have suffered multi-layered, systematic discrimination at the hands of juries under the present system. Moreover, the wealth of manufacturing corporations appears to have affected even appellate review of punitive damages awards. The RAND researchers have stated:

> Considerations of . . . defendants' wealth might also affect judicial review of punitive damages. Our survey to determine final award disposition indicated that awards against business defendants were reduced less by post-trial actions than were awards against individuals. . . . [T]he results suggest that not only do business defendants have larger punitive

> awards assessed against them, but they are also likely to pay a greater portion of those awards.

Id. at 53.

Punishments imposed under these circumstances violate a fundamental tenet of American law, a tenet that this Court has cogently summarized in another context:

> Juries are invariably given careful instruction on the law and how to apply it before they are authorized to decide the merits of a lawsuit. *It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law. . . . It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.*

Gregg v. Georgia, 428 U.S. 153, 192-93 (1976) (discussing detailed statutory guidelines provided for jury and for reviewing court to decide whether to impose capital punishment) (emphasis added).

Because punitive damages imposed under these circumstances are not based on any articulated or identifiable standard, they are "excessive" under both of the tests used by this Court in determining the constitutionality of punishments under the Eighth Amendment. The first such test holds that a "punishment is excessive . . . if it is unnecessary." *Furman v. Georgia*, 408 U.S. 238, 279, 331 (1972) (Brennan & Marshall, JJ., concurring). *Accord Gregg v. Georgia*, 428 U.S. at 173 (plurality opinion). The second is that punishments must be proportionate to the wrongs committed. *See Solem v. Helm*, 463 U.S. 277, 284-86 (1983); *Gregg v. Georgia*, 428 U.S. at 173 (plurality opinion).

Punitive awards imposed pursuant to standardless jury submissions violate the first of these tests because those punishments serve no valid state interest. This Court has already declared that "states have no substantial inter-

est in securing for plaintiffs gratuitous awards of money damages far in excess of any actual injury." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). Specifically, neither deterrent nor retributive goals can properly be served by standardless punitive awards.

The theory of deterrence assumes that the person to be deterred will rationally weigh the benefits and costs (including the possible punitive sanctions discounted by the probability of their being imposed) likely to flow from contemplated wrongful conduct. Proper deterrence obtains, therefore, only if actors are informed about the magnitude of the costs, including punishments, that they are likely to incur if they engage in that conduct. When juries are allowed to award punitive damages pursuant to laws that establish no standards, the actor contemplating wrongful conduct can only guess at the likely consequences.

Proper deterrence also requires that punishment be imposed in the amount, and only in the amount, needed to ensure that the actor's expected costs (that is, actual costs adjusted upward to account for the probability that the conduct will not be detected and successfully prosecuted by injured persons), including punishments, equal any wrongful gain that he would otherwise expect to obtain from the wrongful conduct. *See* H. Packer, *The Limits of the Criminal Sanction* 45-48 (1968); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 23-34, 43-53 (1982); Note, *Punitive Damages For Libel*, 98 Harv. L. Rev. 847, 849-51 (1985). Any other punishment will either overdeter or underdeter. Therefore, if punishments actually imposed have not been required to reflect this limitation, the punished defendants and other actors will see the absence of the required relationship and will be either overdeterred or underdeterred in the future.

Punitive awards imposed pursuant to standardless jury submissions also fail to serve the state's retributive purposes. The basic test of the propriety of a punishment as retribution is that the punishment must be proportionate to the wrongdoing. *See* Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 Stan. L. Rev. 838, 846 (1972). This is also the second test for excessiveness of punishments articulated by this Court. *See* p. 15, *supra*. Punitive damages imposed pursuant to standardless jury submissions violate the proportionality requirement in two respects.

First, the punitive award imposed in a particular case for a particular act will be disproportionate if it is not approximately the same as the punitive awards imposed in other instances for similar acts. If there is no fixed maximum of any kind on punitive damages awards, and if juries are not told what other punitive awards have been imposed for similar acts and that their award should not substantially differ, disproportionality will result.

Second, punishment imposed for one form of wrongdoing will not be properly proportioned unless it is less severe than the punishments imposed for more serious forms of wrongdoing and is more severe than the punishments imposed for less serious forms of wrongdoing. Again, however, if proportioned maxima have not been established beforehand to limit juries' awards for various forms of wrongdoing, and if juries are not instructed as to what punishments have been imposed for different forms of wrongdoing and that the punishment they impose must be appropriately proportioned, the relationships between punishments and wrongful acts from case to case will be purely fortuitous. Disproportionality will necessarily result.

Neither of these problems infects criminal sentencing or civil fines in the manner that these problems infect jury-imposed discretionary punitive damages awards. Legislatures establish maximum criminal fines, prison

terms, and civil fines and thereby establish proportionality between punishments and wrongs in advance. In addition, the judges who impose criminal sentences and civil fines are aware of the legislatively established proportions. The judges also do not impose a sentence or fine in one case without the benefit of knowing what sentences or fines have been imposed in both similar and dissimilar cases.

Juries imposing discretionary punitive damages have none of these guides or restraints. They exercise uninformed license based on the emotion of the case before them.

In sum, the prevailing punitive damages system has resulted in multi-million-dollar punishments vastly exceeding legislatively specified criminal punishments and civil fines for comparable and more culpable conduct; the system has created not just the risk, but the actuality, of erroneous deprivations, as demonstrated by the Minnesota Supreme Court's remittitur in this very case; and the states' purposes of retribution and deterrence are disserved by this system. This is precisely the type of situation in which the Due Process Clause requires heightened procedural safeguards. *Cf. Matthews v. Eldridge*, 424 U.S. 319 (1976) (identifying three-part test for determining required level of procedural protection); *see generally* Wheeler, *The Constitutional Case for Reforming Punitive Damage Procedures*, 69 Va. L. Rev. 269 (1983). But the states have continued to withhold them and are likely to continue to do so until this Court requires otherwise.

CONCLUSION

There is an urgent need for the states to "replac[e] arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing [punishment]." *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (capital punishment case). This Court should grant the petition for a writ of certiorari and review the prevailing punitive damages laws to determine whether the Eighth and Fourteenth Amendments require as much.

Respectfully submitted,

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OCTOBER TERM, 1988

THE GOODYEAR TIRE & RUBBER COMPANY,
Petitioner,

vs.

DALE L. HODDER,
Respondent.

OBJECTION OF RESPONDENT TO THE MOTION OF THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., PRODUCT LIABILITY ADVISORY COUNCIL, INC., AND NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITION

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No. 88-626

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE GOODYEAR TIRE & RUBBER COMPANY,

Petitioner,

vs.

DALE L. HODDER,

Respondent.

OBJECTION OF RESPONDENT TO THE MOTION OF THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., PRODUCT LIABILITY ADVISORY COUNCIL, INC., AND NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITION

The motion of *amici curiae* fails to set forth facts or questions of law that have not been presented or reasons for believing that they will not be adequately presented by the parties as required by United States Supreme Court Rule 36.3. Since Goodyear is a major product manufacturer and a long standing member of the National Association of Manufacturers, *amicus* herein, there is no reason to believe that Goodyear is not competent to argue whatever facts and law that may be asserted by *amici curiae*.

The motion and brief of *amici curiae* is nothing more than a self-serving attempt to constrain the exercise of vital state interests for the economic benefit of manufacturers purportedly to serve the "health and comfort of the consuming public." It makes sweeping and unsupported statements about the impact of punitive damages on American industry, while ignoring the justification for those damages and the acts upon which they are based. *Amici curiae* support the conduct of Johns-Manville Corporation and A. H. Robins Company while casting a blind eye on the thousands of deaths and serious injuries caused by their willful and wanton misconduct, not to mention the billions of dollars expended to correct their misdeeds.[1] Yet, despite the death and ruin left in the wake of their misconduct, Johns-Manville and A. H. Robins continue as profitable corporate operations.[2]

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1. One study estimated that 350,000 deaths and 200,000 to 300,000 injuries with significant impairment or disability will result from exposure to asbestos fibers. It is also estimated that tens of thousands of women have been seriously injured or killed by the Dalkon Shield. Page, *Asbestos and the Dalkon Shield: Corporate America on Trial*, 85 Mich. L. Rev. 1324 (1987).

2. Both Johns-Manville and A. H. Robins remain in business, having reorganized under Chapter 11 bankruptcies. Contrary to the assertions of *amici curiae*, these bankruptcies were not caused by the award or threat of punitive damages alone. Both companies estimated their total future liability based primarily on their exposure to compensatory damages, the legitimacy of which is not at issue here. *See McArthur v. Johns-Manville Corporation*, 837 F.2d 89, 90 (2nd Cir. 1988); *Hansen v. Johns-Manville Products Corp.*, 734 F.2d 1036, 1041 (5th Cir. 1984); *In Re: A. H. Robins Company, Inc.*, 85 B.R. 373, 376 (S.D. Va. 1988). In fact, in both reorganizations, the courts refused asbestos and Dalkon-Shield claimants' recovery of punitive damages. *In Re: Johns-Manville Corporation*, 68 B.R. 618 (S.D.N.Y. 1986), *aff'd sub nom., Kane v. Johns-Manville Corporation*, 843 F.2d 636 (2nd Cir. 1988); *In Re: A. H. Robins Company, Inc.*, 89 B.R. 555, 562, 563 (S.D. Va. 1988). While in reorganization, the financial health of A. H. Robins Company has improved substantially. *In Re: A. H. Robins Company, Inc.*, 88 B.R. 742, 748 (S.D. Va. 1988).

The egregiousness of their conduct, however, cannot be ignored in assessing the appropriateness of punitive damages. It is a well known fact that both companies, like Goodyear, were long aware that their products caused serious injury and death to their customers. Page, *Asbestos and the Dalkon-Shield: Corporate America on Trial*, 85 Mich. L. Rev. 1324, 1326 (1987); Note, *Strategic Bankruptcies: Class Actions, Classification & The Dalkon-Shield Cases*, 7 Cardozo L. Rev. pp. 817, 820, 821 (1986). After sale of the products and discovery of the harm they were causing, neither company took action to remedy the situation until forced to do so by the civil justice system. Even an authority relied upon by *amici curiae* acknowledges the "clear evidence" of A. H. Robins' "corporate irresponsibility." Connell, *The Crisis in Contraception*, May/June 1987, Technology Review 47, 51. In the face of these tragedies *amici curiae* cannot legitimately argue that the fate of Johns-Manville and A. H. Robins detracts from the "health and comfort" of the public, nor legitimately criticize the forced removal of products such as asbestos, the Dalkon-Shield and Bendectin from the market.[3]

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3. Bendectin was an anti-nausea medication prescribed for pregnant women. It was found that there was a high incidence of infants born without hands, arms, feet and even legs to Bendectin mothers. The manufacturer denied and continues to deny any causal connection between Bendectin and these severe birth defects. However, the jury in *Ealy v. Richardson-Merrell, Inc.*, 56 U.S.L.W. 2232 (E.D.D.C. 1987), found such a causal connection. While the jury's compensatory award of $20 million was upheld, the District Court remitted the punitive damage award to zero. Although it is unknown whether the withdrawal of Bendectin was done for the good of society or because it became too expensive to manufacture, it is certain that the withdrawal did not come as the result of punitive damage awards as *amici curiae* suggests. The final example given by *amici curiae* relates to the swine flu fiasco. The

(Continued on following page)

Amici curiae's erroneous assertion of a punitive damage explosion is akin to "falsely shouting fire in a theatre and causing a panic." *Schenck v. United States*, 249 U.S. 47, 52 (1919). The "panic" *amici curiae* seek to portray is unfounded. Comprehensive studies have indicated that punitive damage awards are rare in product liability cases. In a survey conducted on product liability cases decided by state and federal appellate courts between December, 1984 and December, 1985, it was found that punitive damages were allowed in only two percent of those cases. Landes & Posner, *New Light on Punitive Damages*, Regulation, 33-36 (1986). Because the survey sample was limited to appellate cases, the two percent frequency rate is likely overstated. *Id.* at 35. The study of the Rand Corporation's Institute For Civil Justice, relied upon by *amici curiae*, supports this conclusion. The study found that "punitive damage awards appear to be more frequent in asbestos cases than in product liability cases generally, but they were still rare. The Institute For Civil Justice, *An Overview of the First Five Program Years, April, 1980 - March, 1985*, at 57. The study concluded that punitive damages were awarded in "less than one percent of the claims closed during the study period." *Id.* Rand also concluded, contrary to the assertion of *amici curiae*, that "[j]uries did not seem to distinguish between corporations and individuals in reaching decisions about liability." *Id.* at 27.

Footnote continued—

fact that manufacturers refused to supply the influenza vaccine until Congress enacted legislation giving them immunity from liability has nothing to do with any civil award of punitive damages. The claims for death and paralysis, largely from Guillain-Barre syndrome related to the vaccine, were all made against the United States government but only for compensatory damages.

In 1986, the American Bar Foundation reported that, "punitive damages were not often awarded in product liability or medical malpractice cases. In fact, it was relatively rare for plaintiffs to win any kind of award in those two areas." Daniels, *Punitive Damages: The Real Story*, A.B.A.J., 60, 61 (Aug. 1, 1986). The situation in Minnesota is no different. In evaluation of jury verdicts rendered between January 1, 1982 through June 30, 1987, the Minnesota Justice Foundation found that "there has been no substantial increase in the number of cases filed, the percentage of plaintiff verdicts or the average amount of dollars awarded by Minnesota juries. . .". Minnesota Justice Foundation, *Minnesota Jury Verdicts, 1982-1987*, at 5 (1988). The survey concluded that "substantial increases in liability insurance premiums between 1982 and 1987 were not caused by any general increase in the number of cases filed, the percentage of plaintiffs' verdicts, or the size of Minnesota jury awards during the same period." *Id.* at 12.

Amici curiae claim that punitive damage awards increase the cost of manufactured goods because of high insurance premiums and conversely that punitive damage limits would lower those costs. Insurance industry studies, however, have indicated that punitive damage restrictions have no impact in reducing product liability insurance premiums. *See Claim Evaluation Project, National Overview*, Hamilton, Rebinovitz & Alschuler, Inc., 40-42, 62-64, 77-78 (1987).

Goodyear itself does not suggest to the Court a formula for punitive damages in products cases and now concedes that it is not attacking the constitutionality of the Minnesota Punitive Damage Statute. Petitioner's

Reply Memorandum at 5. *Amici curiae* urge the adoption of a standard which as a proper deterrent would require that the punishment "equal any wrongful gain that [the manufacturer] would otherwise expect to obtain from the wrongful conduct. . . . Any other punishment will either overdeter or underdeter [sic]." *Amici* Brief at 16. This was precisely the standard argued by counsel for Hodder at the trial. The court below took a more conservative view, affirming the judgment for a reduced amount. *Hodder v. The Goodyear Tire & Rubber Company*, 426 N.W.2d 826, 841 (Minn. 1988), *reh'g denied* (July 25, 1988).

CONCLUSION

The motion of *amici curiae* for leave to file a brief in support of Goodyear's Petition for Writ of Certiorari should be denied for its noncompliance with United States Supreme Court Rule 36.3. The motion does not set forth facts or reasons for believing that they will not adequately be presented by the parties. To the limited extent the brief of *amici curiae* discusses this case, the arguments are repetitive of those made by Goodyear. The sweeping and unsupported attack on punitive damages generally proves that *amici curiae* seek to use this case as a forum to assert their special interests while overlooking the specific safeguards afforded by the Minnesota legislature and courts and Goodyear's conceded procedural failures. For these reasons, Respondent Dale L. Hodder asks this Court for denial of the Motion of the Motor Vehicle Manufacturer's Association of the United States, Inc., Product Liability Advisory Council, Inc., and National Association of Manufacturers of the

United States of America for Leave to File Brief as *Amici Curiae* in Support of the Petition. Respondent Hodder asks the Court to deny the Petition of The Goodyear Tire & Rubber Company for Writ of Certiorari to the Supreme Court of Minnesota.

Respectfully submitted,

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